(27)

No. 96-511-ATX Title: Janet Reno, Attorney General of the United States, et al., Appellants
v.
American Civil Liberties Union, et al.

Docketed:
October 1, 1996 Court: United States District Court for the Eastern District of Pennsylvania

Entry	Date	Proceedings and Orders
	Aug 16 1996	Application (A96-127) to extend the time to file a jurisdictional statement on appeal from August 30, 1996 to September 29, 1996, submitted to Justice Souter.
	Aug 19 1996	Application (A96-127) granted by Justice Souter extending the time to file until September 29, 1996.
	Sep 30 1996	Statement as to jurisdiction filed. (Response due October 31, 1996)
	Sep 30 1996	Appendix of appellants Janet Reno, Attorney General, et al. filed.
	Oct 31 1996	Memorandum of appellees American Library Association, et al. filed.
	Oct 31 1996	Motion of appellees American Civil Liberties Union, et al. to affirm filed.
	Nov 13 1996	DISTRIBUTED. November 27, 1996
	Nov 25 1996	Brief of appellants in opposition to motion to affirm and reply to response to the jurisdictional statement filed.
	Dec 2 1996	REDISTRIBUTED. December 6, 1996
	Dec 6 1996	PROBABLE JURISDICTION NOTED. The brief of appellants is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, January 21, 1997. The briefs of appellees are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, February 20, 1997. A reply brief, if any, may be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 7, 1997. Rule 29.2 does not apply. SET FOR ARGUMENT March 19, 1997. **********
	Jan 21 1997	Brief of appellants Janet Reno, Attorney General of the United States, et al. filed.
	Jan 21 1997	Brief amici curiae of Members of Congress Dan Coats, et al. filed.
	Jan 21 1997	Brief amicus curiae of Family Life Project of the American Center for Law & Justice filed.
	Jan 21 1997	Brief amici curiae of Enough is Enough, et al. filed.
	Jan 21 1997	Brief amicus curiae of Morality in Media, Inc. filed.
	Jan 29 1997	Record filed.
	Jan 29 1997	Joint appendix filed.
	Feb 5 1997	Motion of appellees for divided argument filed.
	Feb 19 1997	CIRCULATED.
	Feb 19 1997	Brief amicus curiae of Playboy Enterprises, Inc. filed.
	Feb 19 1997	Brief amici curiae of American Association of University Professors, et al. filed.
	Feb 19 1997	LODGING consisting of 12 copies of an appendix and 12 copies of a CD-ROM containing an electronic version of

2 pp

No. 96-511-ATX

Entry	Date	Proceedings and Orders
		both the brief and appendix of Internet material referred to by counsel for the amici American Association of University Professors, et al.
	Feb 20 1997	Brief of appellees American Civil Liberties Union, et al. filed.
	Feb 20 1997	Brief of appellees American Library Association, et al. filed.
	Feb 20 1997	Brief amici curiae of Site Specific, Inc., and Jon Lebkowski filed.
	Feb 20 1997	Brief amici curiae of Apollomedia Corporation, et al. filed.
	Feb 20 1997	Brief amici curiae of Association of National Advertisers, Inc., et al. filed.
	Feb 20 1997	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
	Feb 20 1997	Brief amicus curiae of Feminists for Free Expression filed.
	Feb 20 1997	Brief amici curiae of Reporters Committee for Freedom of the Press, et al. filed.
	Feb 20 1997	Brief amici curiae of National Association of Broadcasters, ABC, CBS and NBC filed.
	Feb 20 1997	Motion of James J. Clancy for leave to file a brief as amicus curiae filed.
	Feb 20 1997	Brief amici curiae of Volunteer Lawyers for the Arts, et al. filed.
	Mar 3 1997	Motion of appellees for divided argument DENIED.
	Mar 7 1997	Reply brief of appellants Janet Reno, Attorney General, et al. filed.
	Mar 17 1997	Motion of James J. Clancy for leave to file a brief as amicus curiae GRANTED.
	Mar 19 1997	ARGUED.

Supreme Court, U.S.
FILED

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In the Supreme Court of the United States

OCTOBER TERM, 1995

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., APPELLANTS

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the federal criminal prohibition against the use of a "telecommunications device" to "knowingly * * * make[], create[], or solicit[], and * * * initiate[] the transmission of" any material "which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age," 47 U.S.C. 223(a)(1)(B), is unconstitutional on its face.

2. Whether the federal criminal prohibition against "knowingly" using an "interactive computer service" to send to "a specific person or persons under 18 years of age," any material "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs," 47 U.S.C. 223(d)(1)(A), is unconstitutional on its face.

3. Whether the federal criminal prohibition against "knowingly" using an "interactive computer service" to "display in a manner available to a person under 18 years of age," any material "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs," 47 U.S.C. 223(d)(1)(B), is unconstitutional on its face.

4. Whether the federal criminal provisions that forbid a person from knowingly permitting the use of a telecommunications device under such person's control to be used to violate any of the three preceding prohibitions, 47 U.S.C. 223(a)(2) and (d)(2), are unconstitutional on their face.

PARTIES TO THE PROCEEDINGS

Appellants are Janet Reno, the Attorney General of the United States, and the United States Department of Justice. Appellees are the American Civil Liberties Union, Human Rights Watch, Electronic Privacy Information Center, Electronic Frontier Foundation, Journalism Education Association, Computer Professionals for Social Responsibility, National Writers Union, Clarinet Communications Corp., Institute for Global Communications, Stop Prisoner Rape, AIDS Education Global Information System, Bibliobytes, Queer Resources Directory, Critical Path AIDS Project, Inc., Wildcat Press, Inc., Declan McCullagh d/b/a Justice on Campus, Brock Meeks d/b/a Cyberwire Dispatch, John Troyer d/b/a The Safer Sex Page, Jonathan Wallace d/b/a The Ethical Spectacle, Planned Parenthood Federation of America, Inc., American Library Association, Inc., America Online, Inc., American Booksellers Association, Inc., American Booksellers Foundation for Free Expression, American Society of Newspaper Editors, Apple Computer, Inc., Association of American Publishers, Inc., Association of Publishers, Editors and Writers, Citizens Internet Empowerment Coalition, Commercial Internet Exchange Association, CompuServe Incorporated, Families Against Internet Censorship, Freedom to Read Foundation, Inc., Health Sciences Libraries Consortium, Hotwired Ventures LLC, Interactive Digital Software Association, Interactive Services Association, Magazine Publishers of America, Microsoft Corporation, The Microsoft Network, L.L.C., National Press Photographers Association, Netcom On-line Communications Services, Inc., Newspaper Association of America, Opnet, Inc., Prod-

igy Services Company, Society of Professional Journalists, and Wired Ventures, Ltd.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., APPELLANTS

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the three-judge district court (J.S. App. 1a-148a) is reported at 929 F. Supp. 824.

JURISDICTION

The judgment of the district court was entered on June 12, 1996. A notice of appeal was filed on July 1, 1996. J.S. App. 162a-164a. On August 19, 1996, Justice Souter extended the time for filing a jurisdictional statement to and including September 29, 1996. The jurisdiction of this Court is invoked under Section 561(b) of the Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 143, and 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides that "Congress shall make no law * * *" abridging the freedom of speech." The Fifth Amendment provides that no person shall be "deprived of * * * liberty * * * without due process of law." Section 502 of the Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133, appears in the appendix to the jurisdictional statement. J.S. App. 165a-172a.

STATEMENT

This case involves a constitutional challenge to provisions of the Communications Decency Act of 1996 (CDA), that prohibit the use of "telecommunication devices" and "interactive computer services" to disseminate "indecent" or "patently offensive" sexually explicit material to children under 18 years of age. 47 U.S.C. 223(a)(1)(B), 223(a)(2), 223(d). Those restrictions apply to the dissemination of material on the system of interlinked computers known as the "Internet." They also apply to other interactive computer services, such as electronic bulletin boards. Appellees, organizations and individuals who use the Internet, filed suit in the United States District Court for the Eastern District of Pennsylvania, asserting that the CDA's restrictions on indecent and patently offensive communications violate the First and Fifth Amendments of the Constitution. Focusing on the CDA's impact on the Internet, a three-judge court held that the CDA's restrictions on indecent and patently offensive communications are unconstitutional on their face, and issued a preliminary injunction against their enforcement. Two of

the three judges concluded that the CDA's restrictions on indecent and patently offensive communications are unconstitutionally vague, in violation of the First and Fifth Amendments. All three judges concluded that the prohibitions are unconstitutionally overbroad, in violation of the First Amendment. Pursuant to Section 561(b) of the CDA, 110 Stat. 143, which authorizes a direct appeal to this Court as of right in such circumstances, the Attorney General and the Department of Justice have appealed from the preliminary injunction.[1]

1. The Internet originated from experimental efforts of the Department of Defense to link defense-related computer systems so that research and communication could continue even if portions of the network were damaged. J.S. App. 14a. Similar networks were subsequently developed to link universities, research facilities, businesses, and individuals around the world. *Id.* at 16a. All of those networks were ultimately linked to one another and became the global network known as the Internet. *Ibid.* As many as 40 million people use the Internet today, and that figure is expected to grow to 200 million by 1999. *Id.* at 13a.

Individuals obtain access to the Internet in two basic ways: Some people use a personal computer with a modem to connect over a telephone line to a

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[1] After the decision in this case, a three-judge court in the United States District Court for the Southern District of New York issued its own preliminary injunction against enforcement of the CDA's restrictions on patently offensive communications. *Shea* v. *Reno*, 930 F. Supp. 916 (1996). The Attorney General has appealed from that preliminary injunction, and the jurisdictional statement in that case is due to be filed by October 14, 1996.

computer network that is linked to the Internet; others use a computer that is directly connected to a computer network that is itself linked to the Internet. J.S. App. 16a-17a. Many entities offer modem and direct connections to the Internet. For example, national commercial online services, such as America Online, charge subscribers a monthly fee for access to the Internet through their own computer networks. *Id.* at 19a. "Internet service providers" also offer access to a computer network that is linked to the Internet. Most of those providers also charge a monthly or hourly fee. *Ibid.* In addition, educational institutions often provide Internet access to students and faculty through computers located on campus, *id.* at 17a, and some businesses provide such access to their employees through office networks, *id.* at 17a-18a.

There are many ways for people to communicate on the Internet. One of the most common ways is through electronic mail (e-mail). Using e-mail, an individual can send an electronic message to one or more specific persons. J.S. App. 21a. People can also use automatic mailing list services (mail exploders) to send messages on a particular topic (such as health care) that are then automatically distributed via e-mail to those who have subscribed to the mailing list. *Id.* at 22a. Information can similarly be exchanged through newsgroups. *Id.* at 22a-23a. Like mail exploder users, newsgroup users ordinarily exchange information on specific topics. Unlike mail exploder users, however, newsgroup users do not have to subscribe in advance; instead, they can obtain access to the information at any time. *Id.* at 23a. Persons can also use the Internet to communicate in "real time." Programs such as "talk" permit one-to-one communication; programs such as "Internet Relay Chat" permit communication among several persons. *Id.* at 24a.

Another way to use the Internet is to search for and retrieve information that is stored on remote computers. J.S. App. 25a. The most well-known method of doing that is by exploring the "World Wide Web." *Id.* at 25a-26a. The Web uses a formatting language known as hypertext markup language (HTML), and programs that browse the Web can display HTML documents containing text, images, and sound. *Ibid.* HTML also permits documents to include "links" to other Internet documents, so that with the click of a computer "mouse," a person can move from one document to another even if the documents are stored on computers in different parts of the world. *Ibid.* Many organizations have "home pages" on the Web that store information about the organization and its activities and that provide links to other Web sites containing related information. *Id.* at 27a.

"Search engines," such as Altavista and Yahoo, allow persons to comb the Web for sites that contain certain categories of information or specified key words. J.S. App. 30a. For example, "a Web user looking for the text of Supreme Court opinions would type the words 'Supreme Court' into a search engine, and then be presented with a list of World Wide Web sites that contain Supreme Court information." *Ibid.* The user could "brows[e] through the information on each site, until the desired material is found." *Ibid.*

There is a wide range of information available through the Internet. Commercial enterprises maintain Web sites to inform potential customers about their goods and services and to solicit purchases. J.S. App. 43a. Nonprofit organizations make information

available on topics of interest to them. *Ibid.* Libraries have placed their card catalogs online. *Id.* at 42a. And chat rooms and newsgroups provide forums for the discussion of thousands of different topics, from Formula 1 racing cars to the Oklahoma City bombing. *Id.* at 42a-43a, 47a-48a. Information that is available on the Internet "is as diverse as human thought." *Id.* at 43a.

2. Congress found that the Internet and other interactive computer services "represent an extraordinary advance in the availability of educational and informational resources," and that they "offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." Pub. L. No. 104-104, § 509, 110 Stat. 138 (1996) (to be codified at 47 U.S.C. 230(a)(1) and (3)). But Congress was concerned that without "some basic rules of the road," the corresponding increase in the availability and easy accessibility of sexually explicit materials would harm children. 141 Cong. Rec. S8087 (daily ed. June 9, 1996) (remarks of Sen. Exon). As Senator Exon stated, "[t]he computer is a wonderful device for arranging, storing, and making it relatively easy for anyone to call up information or pictures on any subject they want. That is part of the beauty of the Internet system." *Id.* at S8089. That same technology, however, allows sexually explicit materials, including "the worst, most vile, [and] most perverse pornography," to be "only a few click-click-clicks away from any child." *Id.* at S8088.

Congress was particularly concerned about the accessibility of pornography to children, because children have increasingly become "the computer experts in our Nation's families." 141 Cong. Rec.

S8332 (daily ed. June 14, 1995) (remarks of Sen. Coats). As one of the CDA's most vocal opponents stated, even "[v]ery young children are so adept with computers that they can sit at a key pad in front of a computer screen at home or at school and connect to the outside world through the Internet or some other on-line service." *Id.* at S8341 (remarks of Sen. Leahy). One study presented to Congress estimated that "[o]f the 6.8 million homes with on-line accounts currently available, 35 percent have children under the age of 18." *Id.* at S8333 (remarks of Sen. Coats). Congress was determined to ensure that the "brave new world" of interactive computer services would not be "hostile to the innocence of our children." 142 Cong. Rec. S707 (daily ed. Feb. 1, 1996) (remarks of Sen. Coats).

Congress also learned that the wide availability of pornographic material on the Internet was deterring Internet use by parents who did not want to risk exposing their children to such material. By imposing restrictions on children's access to such material, Congress sought to ensure that interactive computer services such as the Internet would be "a family friendly resource," 142 Cong. Rec. S718 (daily ed. Feb. 1, 1996) (remarks of Sen. Coats), that would be "more frequently used," 141 Cong. Rec. S8339 (daily ed. June 14, 1995) (remarks of Sen. Exon). See *id.* at S8339-S8340 ("We want to make it even bigger, and we want to make it even better, but not for raunchy pornography that would turn most people off.").

b. In order to respond to the increasing availability of sexually explicit materials through computers, Congress enacted Section 502 of the CDA, Pub. L. No. 104-104, 110 Stat. 133. Section 502(1) amends 47 U.S.C. 223(a)(1)(B), which had originally applied only

to telephones, to forbid any person from using a "telecommunications device" such as a modem to "knowingly * * * make[], create[], or solicit[], and * * * initiate[] the transmission of" any communication "which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age." 110 Stat. 133. Section 502(2) adds a new 47 U.S.C. 223(d)(1), which contains two distinct restrictions on the use of "interactive computer services." The first prohibits the knowing use of an interactive computer service "to send to a specific person or persons under 18 years of age" material "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." 110 Stat. 133-134 (to be codified at 47 U.S.C. 223(d)(1)(A)). The second prohibits the use of an interactive computer service "to display [such material] in a manner available to a person under 18 years of age." 110 Stat. 134 (to be codified at 47 U.S.C. 223(d)(1)(B)). Complementing the three preceding restrictions, Section 502 also prohibits any person from "knowingly permit[ting] any telecommunications facility under [that person's] control to be used for any activity prohibited by" the other prohibitions. 110 Stat. 133, 134 (to be codified at 47 U.S.C. 223(a)(2) and (d)(2)). Persons who violate the CDA's prohibitions are subject to criminal fines and/or imprisonment for not more than two years. Pub. L. No. 104-104, §§ 502(1), 502(2), 110 Stat. 133, 134 (to be codified at 47 U.S.C. 223(a) and 223(d)).

Section 502(2) provides a "defense to a prosecution" for those persons who have restricted access to their communications "by requiring use of a verified credit card, debit account, adult access code, or adult

personal identification number." 110 Stat. 134 (to be codified at 47 U.S.C. 223(e)(5)(B)). A defense to prosecution is also available to those who have "taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors" to indecent or patently offensive communications, "including any method which is feasible under available technology." 110 Stat. 134 (to be codified at 47 U.S.C. 223(e)(5)(A)). [2] By permitting those defenses, Congress sought to keep sexually explicit materials on the Internet "away from children," while at the same time protecting on-line services or information providers who make a good-faith and effective effort to prevent such materials from reaching minors. 142 Cong. Rec. H1175 (daily ed. Feb. 1, 1996) (statement of Rep. Goodlatte).

3. The day the President signed the CDA into law, appellee American Civil Liberties Union, joined by other organizations and some individuals, filed suit in the United District Court for the Eastern District of Pennsylvania against the Attorney General and the Department of Justice to challenge the constitutionality of the CDA's restrictions on indecent and patently offensive communications. J.S. App. 3a. They alleged that those restrictions are facially unconstitutional under the First Amendment and the Due Process Clause of the Fifth Amendment. *Id.* at 2a. District Judge Ronald L. Buckwalter issued a temporary restraining order (TRO) against enforcement of the restrictions on "indecent" communications, but rejected appellees' request for a TRO

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[2] Unless otherwise noted, we refer to the provisions of the CDA as they will ultimately be codified in the United States Code.

against enforcement of the restrictions on "patently offensive" communications. *Id.* at 153a-161a.

Appellee American Library Association, the major online service providers (including America Online, Inc., CompuServe, and Prodigy), and various other organizations, subsequently filed their own facial constitutional challenge to the same provisions. J.S. App. 4a-5a & n.3. The suits were consolidated and heard by a three-judge court pursuant to Section 561(a) of the CDA, 110 Stat. 143, which provides that any civil action challenging the constitutionality of any provision of the CDA "on its face" shall be heard by such a court. J.S. App. 3a, 5a.

After a hearing, the court granted appellees' motion for a preliminary injunction. J.S. App. 1a-149a. For reasons outlined in three separate opinions, the court concluded that appellees had established "a reasonable probability of eventual success in the litigation" by "demonstrating" that the CDA's restrictions on indecent and patently offensive communications are "unconstitutional on their face." *Id.* at 62a.

a. Two members of the court concluded that the CDA's provisions are unconstitutionally vague.

Judge Buckwalter and Judge Sloviter assumed that the "indecent" communications restricted by Section 223(a) are the same as the "patently offensive" communications restricted by Section 223(d)—*i.e.*, that both refer to material "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs," 47 U.S.C. 223(d)(1)(B). J.S. App. 64a-65a, 92a-93a. Judge Buckwalter viewed that definition as unconstitutionally vague, for two reasons: First, the definition does not expressly restrict the communications that it prohibits to those that are

indecent for "the medium of cyberspace" (*id.* at 95a); and second, the definition does not expressly state whether the relevant community standard is a uniform national standard or a local standard that varies depending on where access to the information is obtained (*id.* at 96a-97a). Judge Sloviter agreed that the terms "indecent" and "patently offensive" are inherently vague. *Id.* at 80a.

Judge Dalzell concluded that indecent and patently offensive mean the same thing under the CDA—speech that, "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." J.S. App. 110a. That definition, he concluded, is not unconstitutionally vague. *Id.* at 111a-112a. He reasoned that the definition "contains a subset of the elements of obscenity" set forth in *Miller* v. *California*, 413 U.S. 15 (1973), that this Court has upheld the *Miller* standard against vagueness challenges, and that "the omission of parts of that test does not warrant a contrary conclusion." J.S. App. 111a-112a.

b. All three members of the court concluded that the statutory restrictions on indecent and patently offensive communications are unconstitutionally overbroad.

The court found that sexually explicit material "from the modestly titillating to the hardest-core" is available on the Internet, J.S. App. 47a, and all three judges assumed that the government has a compelling interest in protecting minors from at least some sexually explicit material. *Id.* at 72a-73a (Sloviter, J.); *id.* at 87a (Buckwalter, J.); *id.* at 143a (Dalzell, J.). The court nonetheless concluded that the CDA's restrictions on indecent and patently offensive com-

munications impermissibly burden speech that is protected by the First Amendment.

Judge Sloviter premised her conclusion on a determination that "it is either technologically impossible or economically prohibitive" for "many" Internet users to limit their communications to adults. J.S. App. 73a-74a. She specifically found that "no technology exists which allows those posting on the category of newsgroups, mail exploders, or chat rooms to screen for age," *id.* at 74a, and that while "efforts at age verification are technically feasible" on the World Wide Web, "as a practical matter, non-commercial organizations and even many commercial organizations using the Web would find it prohibitively expensive and burdensome to engage in * * * age verification," *ibid.* Judge Sloviter therefore concluded that, for many Internet users, the CDA operates as a "complete ban" on indecent expression of the kind that this Court condemned in *Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115 (1989). J.S. App. 74a. Judge Buckwalter concurred in Judge Sloviter's opinion, agreeing that "current technology is inadequate to provide a safe harbor to most speakers on the Internet." *Id.* at 84a.

Judge Dalzell concluded that, because of the "special attributes of Internet communication * * *[,] Congress may not regulate indecency on the Internet at all." J.S. App. 131a. Stating that "the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen," *id.* at 141a, Judge Dalzell concluded that the Internet "deserves the broadest possible protection from government-imposed, content-based regulation." *Id.* at 142a.

c. Based on its conclusion that the CDA's restrictions on indecent and patently offensive communications are facially unconstitutional, the three-judge court entered a preliminary injunction that prevents the Attorney General from "enforcing, prosecuting, investigating or reviewing any matter premised upon" those restrictions. J.S. App. 148a-149a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The decision below effectively invalidates the CDA's restrictions on the dissemination of indecent and patently offensive material to children. The decision therefore imperils the government's ability to protect children from exposure to sexually explicit material that is now widely disseminated on the Internet. Equally significant, the decision leaves many parents who do not want to expose their children to sexually explicit material with little choice but to severely limit or altogether deny their children's access to the Internet.

The court's constitutional rulings are deeply flawed. The CDA is not unconstitutionally vague. This Court's decisions in *Miller* v. *California*, 413 U.S. 15 (1973) and *Denver Area Educational Telecommunications Consortium, Inc.* v. *FCC*, 116 S. Ct. 2374 (1996) (*Denver Area*), rejected vagueness challenges to analogous prohibitions. As those decisions demonstrate, the CDA's restrictions give sufficient warning concerning the core of what they prohibit to satisfy the First Amendment and the Due Process Clause.

The district court also incorrectly held the CDA's indecency restrictions facially invalid based on a determination that they unconstitutionally interfere with adult-to-adult communication in a substantial

number of cases. Two of the three primary restrictions at issue here are clearly constitutional and should not have been enjoined in any respect. They prohibit the transmission of indecent or patently offensive material to a particular person or persons knowing that the recipient is under age 18, and do not significantly interfere with adult-to-adult communication at all. The third restriction prohibits the display of patently offensive material in a manner "available" to children, and raises more difficult questions. But the CDA provides a defense to prosecution for persons who take reasonably effective steps to prevent indecent material from reaching children, such as by requiring verified credit cards or adult IDs—something many commercial content providers already do. The third prohibition is therefore facially constitutional as well.

Even if one or more of the CDA's restrictions were unconstitutional in some of their applications, it would not justify an injunction barring enforcement of all of those restrictions in all respects. The operative severability clause, 47 U.S.C. 608, directs courts to preserve all provisions and all applications of the CDA that are constitutional.

Because the decision below effectively invalidates provisions of an important Act of Congress, and because that decision is based on a faulty constitutional analysis, this Court should note probable jurisdiction and set the case for plenary review.

1. The provisions of the CDA at issue on this appeal—47 U.S.C. 223(a) and (d)—prohibit the use of telecommunication devices and interactive computer services to disseminate or display sexually explicit material to children under the age of 18. Section 223(a) refers to the sexually explicit material that is

covered by its prohibitions as "communication[s]" that are "indecent," while Section 223(d) refers to the category of covered material as "communication[s] that in context, depict[] or describe[], in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." As Judge Dalzell concluded, however, the two descriptions are interchangeable. "[T]he use of 'indecent' in § 223(a) is shorthand for the longer description in § 223(d). Conversely, the longer description in § 223(d) is itself the definition of 'indecent' speech." J.S. App. 110a; see S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 188 (1996) ("The conferees intend that the term indecency (and the rendition of the definition of that term in new section 502) has the same meaning as established in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978) and *Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115 (1989).").

Sexually explicit speech that is patently offensive is not without constitutional protection. *Sable*, 492 U.S. at 126. Nonetheless, because "[t]here are few, if any, thoughts that cannot be expressed by the use of less offensive language [or images]," *Pacifica*, 438 U.S. at 743 n.18 (opinion of Stevens, J.), and because indecent communication has the capacity to harm children in ways that cannot readily be undone, *Pacifica*, 438 U.S. at 749, this Court has never held that such speech is immune from governmental regulation. At the very least, the regulation of sexually explicit, patently offensive material is constitutional when it is narrowly tailored to further a compelling interest. *Sable*, 492 U.S. at 126.

The prohibitions at issue on this appeal satisfy that standard. This Court has repeatedly held that the

government has a compelling interest in protecting children from exposure to patently offensive, sexually explicit material. *Denver Area*, 116 S. Ct. at 2387 (Breyer, J.); *id.* at 2416 (Kennedy, J., concurring in part, dissenting in part); *id.* at 2429 (Thomas, J., concurring in part, dissenting in part); *Sable*, 492 U.S. at 126; *Ginsburg* v. *New York*, 390 U.S. 629, 639-640 (1968); *New York* v. *Ferber*, 458 U.S. 747, 756-757 (1982). That interest has particular force in the present context. Patently offensive material is widely disseminated on the Internet, and computer-literate children—of whom there are many—can easily find and retrieve it. Moreover, unless steps are taken to restrict the availability of such material to children, many parents will be deterred from permitting their children to use the Internet; indeed, many parents will be deterred from bringing the Internet into their homes at all. The government therefore has two especially compelling interests at stake in this case—furthering the First Amendment interests of all parents and children in using what has become an unparalleled tool for communicating and retrieving information, while at the same time protecting children against patently offensive, sexually explicit material.

The prohibitions at issue here are narrowly tailored to further the government's compelling interests. They do not flatly ban the dissemination of all patently offensive communications through telecommunications devices or interactive computer services. Instead, they permit adults to disseminate patently offensive material to other adults, as long as they require verified credit cards or adult IDs, or take other reasonable, appropriate, and effective steps to prevent the material from reaching children. 47

U.S.C. 223(e)(5). The provisions at issue here are therefore facially constitutional.

The court below assumed that the government has a compelling interest in protecting minors from sexually explicit material. J.S. App. 72a-73a (Sloviter, J.); *id.* at 87a (Buckwalter, J.); *id.* at 143a (Dalzell, J.). The court also found that sexually explicit material, "from the modestly titillating to the hardest-core," is available on the Internet. *Id.* at 47a. It nonetheless held that the restrictions at issue here are facially unconstitutional because they are impermissibly vague and overbroad. As we explain in points 2 and 3, respectively, those rulings are seriously flawed.

2. The CDA's definition of patently offensive materials is similar to one of the elements that this Court used in *Miller* v. *California*, *supra*, to define material that States may constitutionally regulate as obscenity. See *Miller*, 413 U.S. at 25. Because *Miller* held that the standard it imposed is not unconstitutionally vague, *id.* at 27 & n.10, *Miller* strongly supports the conclusion that the CDA's definition of patently offensive materials is not unconstitutionally vague. See also *Ginsburg*, 390 U.S. at 632-633, 643 (rejecting vagueness challenge to prohibition on the sale of sexually explicit pictures to minors that included as one element that the material be "patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors").

The district court's vagueness holding is also in serious tension with this Court's recent decision in *Denver Area*. In that case, a four-Justice plurality expressly rejected a vagueness challenge to a statutory provision giving cable operators a right to prohibit programming on leased channels "that the cable

operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." 116 S. Ct. at 2381, 2389-2390. Three other Justices voted to uphold the constitutionality of that provision, thereby implicitly rejecting the vagueness challenge. *Id.* at 2419 (opinion of Thomas, J., concurring in part, dissenting in part). Because the CDA's definition of indecency is almost identical to the definition upheld against a vagueness challenge in *Denver Area*, that decision reinforces the conclusion that the CDA's restrictions are not unconstitutionally vague.

The *Denver Area* plurality's discussion of the issue demonstrates why the CDA's definition of indecency is not unconstitutionally vague. The plurality explained that the provision giving cable operators a right to bar patently offensive communications "uses language similar to language previously used by this Court [in *Miller*] for roughly similar purposes," and that it aims at "pictures of oral sex, bestiality, and rape * * * and not at scientific or educational programs (at least unless done with a highly unusual lack of concern for viewer reaction)." 116 S. Ct. at 2389-2390. The plurality also noted that "what is 'patently offensive' depends on context (the kind of program on which it appears)" and "degree (not 'an occasional expletive')." *Id.* at 2390 (quoting *Pacifica*, 438 U.S. at 748, 750). Those guides to meaning are sufficient to give fair warning concerning the core of what is and is not prohibited. See also S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 189 (1996) (determination whether material is patently offensive "cannot be made without a consideration of the context of the description or depiction at issue"; "[m]aterial with

serious redeeming value" that "is quite obviously intended to edify and educate, not to offend," is not patently offensive). While those guides to interpretation do not eliminate all uncertainty, perfect clarity is neither possible nor constitutionally required. *Kolender* v. *Lawson*, 461 U.S. 352, 361 (1983) ("[d]ue process does not require 'impossible standards' of clarity"); *Grayned* v. *City of Rockford*, 408 U.S. 104, 110 (1972) ("[c]ondemned to the use of words, we can never expect mathematical certainty from our language").

Consistent with this Court's decisions in *Miller* and *Denver Area*, the three-judge court in *Shea* v. *Reno*, 930 F. Supp. 916, 931-934 (S.D.N.Y. 1996), held that the CDA's definition of indecency is not unconstitutionally vague. The district court in this case erred in reaching a contrary conclusion.

3. The court below also erred in concluding that the CDA's indecency restrictions are unconstitutionally overbroad. The CDA contains three independent prohibitions against the dissemination or display of patently offensive communications, each of which requires separate analysis.

Section 223(a)(1)(B) forbids any person from using a "telecommunications device" to "knowingly * * * make[], create[], or solicit[], and * * * initiate[] the transmission of" any communication "which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age." Section 223(d)(1)(A) prohibits the knowing use of an "interactive computer service to send to a specific person or persons under 18 years of age" material "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." And

Section 223(d)(1)(B) prohibits the use of an interactive computer service "to display [such material] in a manner available to a person under 18 years of age."

a. The linchpin of the district court's analysis was its determination that it is either technologically impossible or economically infeasible for many Internet users to limit their communications to adults. Based on that premise, the court concluded that the CDA's restrictions effectively create a total ban on indecent communication of the kind that this Court condemned in *Sable*. J.S. App. 73a-74a; *id.* at 83a-84a (Buckwalter, J.).

That concern, however, is not significantly implicated by Section 223(a)(1)(B), which prohibits the use of a "telecommunications device" to "initiate[] the transmission of any * * * communication which is * * * indecent, *knowing* that the recipient of the communication is under 18 years of age." 47 U.S.C. 223 (a)(1)(B) (emphasis added). That prohibition applies only in situations in which a person transmits indecent material to another person, knowing that person is under 18. For example, it would prohibit one-to-one communications via telephone, fax machine, or e-mail, in which the initiator of the indecent communication knows that the particular recipient of the message is under 18. To comply with Section 223(a)(1)(B), persons need not refrain from communicating indecent material to adults; they need only refrain from disseminating such material to persons they know to be under 18. Section 223(a)(1)(B) is therefore narrowly tailored to meet the government's compelling interest in shielding children from indecent material, and the district court erred in enjoining its enforcement.

b. That same analysis applies to Section 223(d)(1)(A), which prohibits use of an "interactive computer service to send [patently offensive material] to a specific person or persons under 18 years of age." Like Section 223(a)(1)(B), Section 223(d)(1)(A) applies to situations in which a person sends indecent material to someone he knows to be under 18. Like Section 223(a)(1)(B), it does not substantially interfere with adult-to-adult communications. For that reason, the district court likewise erred in enjoining its enforcement.[3]

c. Section 223(d)(1)(B), which prohibits the use of an interactive computer service to display patently offensive material "in a manner available" to a person under 18, raises more difficult questions. But the Act provides a defense to prosecution when the user restricts access through a verified credit card or an adult ID, 47 U.S.C. 223(e)(5)(B), or otherwise takes reasonable, appropriate, and effective steps to prevent

---

[3] While there is substantial overlap between Section 223(a)(1) and Section 223(d)(1)(A), there are also some differences in coverage. The former uses the term "telecommunications device." The latter uses the term "interactive computer service," which is defined elsewhere as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. 230(e)(2). Section 223(a)(1) therefore includes the use of a telephone or fax machine, while Section 223(d)(1)(A) does not. On the other hand, the latter provision covers the use of interactive computers that are directly linked to other computers, while the former does not. Both cover the use of computers that are linked through modems. See J.S. App. 6a n.5.

children from obtaining access to the material, 47 U.S.C. 223(e)(5)(A). The district court determined that the statutory defenses are not available as a practical matter to most content providers, rendering Section 223(d)(1)(B) facially invalid. J.S. App. 78a (Sloviter, J); *id.* at 84a (Buckwalter, J). The statutory defenses, however, are available in a wide range of situations, and the CDA leaves open a number of avenues for adult-to-adult communication.

i. For example, those who post patently offensive information on their Web sites for commercial purposes can take advantage of the statutory defenses. The court below found that current technology permits the operator of a Web site to screen visitors by requesting a credit card number or adult ID. J.S. App. 51a. Many commercial sites that display sexually explicit content already use credit card and other adult verification devices to screen for age. *Id.* at 135a (Dalzell, J.). And there is nothing inequitable about requiring those commercial Web site operators who profit from patently offensive material, but do not presently use credit card or adult ID screening devices, to shoulder the modest burdens associated with their use. See *Denver Area*, 116 S. Ct. at 2393 (opinion of Breyer, J.) (suggesting that cost burdens associated with television lock boxes could be imposed on cable system operators). Thus, as the three-judge district court in *Shea* concluded, the credit card and adult ID safe harbor "serves as an adequate defense for at least certain commercial providers of Web content—specifically, those who primarily make Web content available for 'purchase' or, put another way, those who charge Web users to gain access to, and view, their content." 930 F. Supp. at 942-943.

ii. Operators of noncommercial Web sites can also take advantage of the statutory defenses. The court concluded that there is no practical way for such operators to do so. But the findings underlying that determination fail to discuss in any meaningful way the evidence that both commercial and noncommercial Web content providers may use "adult verification services," such as "AdultCheck." See J.S. App. 55a-56a.

Verification services, which maintain their own Web sites, charge persons a nominal yearly fee (*e.g.*, $9.95) for an adult identification number that can be used to gain access to Web sites registered with the service. When a user goes to a registered site, he enters his adult ID number. If the number is valid, the user is automatically admitted to the site; if the number is invalid, entry to the site is denied. See generally Schmidt Exh's. 6 and 8.

Verification services ordinarily do not charge the operator of a Web site a fee, and they will help set up the means for password entry and verify the IDs themselves. See generally Schmidt Exh's. 6 and 8; see also *Shea*, 930 F. Supp. at 934. Because noncommercial entities that post patently offensive material on their Web sites can use adult verification services to prevent children from obtaining access to their sites, Section 223(d)(1)(B) is constitutional as applied to them.

iii. Mail exploder and chat room users who want to disseminate patently offensive material can use a closed mailing list or chat room that has rules limiting participation to adults; if no such list or chat room is in existence that adequately meets their needs, participants can start their own list or chat room and then screen for age (*e.g.* by setting up their own adult

identification system). Also, newsgroup users who wish to exchange patently offensive material could set up their own list of servers and screen for age. See *Shea*, 930 F. Supp. at 947-948 (discussing the above alternatives).

Users of all three forms of communication could also post messages in the relevant mailing list, newsgroup, or chat room directing participants to a Web site that is screened for age to view a particular patently offensive message. Anyone visiting the site could then respond to that message by e-mail. Furthermore, users of all three forms of communication always have the option to tone down their communication so that it does not contain material "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." 47 U.S.C. 223(d)(1)(B).

In the short run, users of mail exploders, newsgroups, and chat rooms who want to disseminate patently offensive material may have to incur some additional costs or burdens, or switch to an alternative method of communicating that material, over the Internet or otherwise. See *Shea*, 930 F. Supp. at 947-948. But Congress is not precluded from imposing some costs and burdens on those who disseminate patently offensive material to ensure that such material does not become widely available to children. That is particularly true when, as here, there is no other effective way to vindicate the government's compelling interests in protecting children from the harmful effects of such material and ensuring that parents are not deterred from making the Internet available to their families. And whatever the dimensions of a person's First Amendment right to use

interactive computer services to transmit patently offensive materials, it cannot include an unqualified right to do so through every possible mode of communication made possible by such services. See *Young* v. *American Mini Theaters, Inc.*, 427 U.S. 50 (1976).

d. Even if Section 223(d)(1)(B) were unconstitutional in some of its applications, the district court erred in enjoining enforcement of all three primary restrictions in all their applications. The CDA was passed as an amendment to the Communications Act of 1934, which provides that "[i]f any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to other persons or circumstances shall not be affected thereby." 47 U.S.C. 608. Under that severability clause, an infirmity in Section 223(d)(1)(B)'s prohibition against the display of patently offensive material should not affect the other two primary provisions, which contain distinct prohibitions against the knowing initiation of communication or transmission of such material to children under age 18. See *Leavitt* v. *Jane L.*, 116 S. Ct. 2068, 2070 (1996) (relying on severability clause in the underlying Act to which the challenged provisions were added). Compare *Denver Area*, 116 S. Ct. at 2397 ("we can find no reason why, in light of Congress's basic objective (the protection of children), Congress would have preferred no provisions at all to [one] provision standing by itself").

The severability clause is significant in another respect. Under that clause, a determination that Section 223(d)(1)(B) is unconstitutional as applied to a particular class of persons or set of circumstances should not affect the constitutionality of applying

that prohibition to other classes of persons or other sets of circumstances. See *Wyoming* v. *Oklahoma*, 502 U.S. 437, 460-461 & n.14 (1992). To take the clearest example, even assuming that Section 223(d)(1)(B) would be unconstitutional as applied to certain types of content providers, there would be no basis for invalidating Section 223(d)(1)(B) as applied to commercial Web sites. See also *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985) (unless there are "countervailing considerations," a statute should be "declared invalid only to the extent it reaches too far, but otherwise left intact"); compare *United States* v. *National Treasury Employees Union*, 115 S. Ct. 1003, 1019 & n.26 (1995) (refusing to preserve certain applications after finding an Act of Congress unconstitutionally overbroad, where Congress had sent conflicting signals as to where the new line should be drawn, each of the new lines would raise independent constitutional concerns, and there was no severability clause).

Upholding the application of Section 223(d)(1)(B) to commercial Web sites would afford significant protection to children. While commercial pornographers on the Web screen some of their material for age through credit card or adult IDs, many post sexually explicit "teasers" that can be viewed without charge. See, *e.g.*, Schmidt Exhs. 20, 25, 26, 27, 44. As a result, by browsing the Web sites of commercial pornographers, children can view an enormous number of sexually explicit pictures without charge. If Section 223(d)(1)(B) were upheld as applied to commercial Web sites, most commercial pornographers would quickly end their practice of posting sexually explicit material that can be viewed without a credit card or adult ID.

e. Other methods of restricting access by children to patently offensive communications may also be available or be developed in the future. For example, the technology already exists for "tagging" communications in all major Internet applications. *Shea*, *supra*, 930 F. Supp. at 932-933. One way for such a system to operate would be for there to be a consensus on a tag (an identifying code) that indicates that material is being marked for compliance with the CDA's indecency restrictions (similar to the R rating for movies). Major browsers could then be programmed to recognize the tag. Such browsing mechanisms may become broadly available and operative—*e.g.* devices could be developed that would automatically block covered material unless it is unblocked by parents, or that would enable parents to block the tagged material with the click of a mouse or in some other easy and understandable way.

In light of the rapid development and innovative capabilities of all components of the Internet industry, there is every reason to expect that technological steps will occur swiftly if the CDA's indecency restrictions are upheld. In the meantime, Congress decided that it is better to place some burdens and costs on those who disseminate or display patently offensive material than it is to leave children wholly unprotected. That judgment by Congress, in the context of a new and rapidly changing technology, is constitutional.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

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SEPTEMBER 1996

(2)
Supreme Court, U.S.
FILED
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No.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

JANET RENO, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL., APPELLANTS

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Civil Action Nos. 96-963, 96-1458

AMERICAN CIVIL LIBERTIES UNION, ET AL.

v.

JANET RENO, ATTORNEY GENERAL
OF THE UNITED STATES

AMERICAN LIBRARY ASSOCIATION, INC., ET AL.

v.

UNITED STATES DEP'T OF JUSTICE, ET AL.

[Filed: June 12, 1996]

Before: SLOVITER, Chief Judge, United States Court of Appeals for the Third Circuit; BUCKWALTER and DALZELL, Judges, United States District Court for the Eastern District of Pennsylvania.

ADJUDICATION ON MOTIONS FOR PRELIMINARY INJUNCTION

I.

INTRODUCTION

Procedural Background

Before us are motions for a preliminary injunction filed by plaintiffs who challenge on constitutional grounds provisions of the Communications Decency Act of 1996 (CDA or "the Act"), which constitutes Title V of the Telecommunications Act of 1996, signed into law by the President on February 8, 1996.[1] Telecommunications Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 56, 133-35. Plaintiffs include various organizations and individuals who, *inter alia*, are associated with the computer and/or communications industries, or who publish or post materials on the Internet, or belong to various citizen groups. *See* ACLU Complaint (¶¶ 7-26), ALA First Amended Complaint (¶¶ 3, 12-33).

The defendants in these actions are Janet Reno, the Attorney General of the United States, and the United States Department of Justice. For convenience, we will refer to these defendants as the Government. Plaintiffs contend that the two challenged provisions of the CDA that are directed to communications over the Internet which might be deemed "indecent" or "patently offensive" for minors, defined as persons under the age of eighteen, infringe upon rights protected by the First Amendment and the Due Process Clause of the Fifth Amendment.

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[1] The CDA will be codified at 47 U.S.C. § 223(a) to (h). In the body of this Adjudication, we refer to the provisions of the CDA as they will ultimately be codified in the *United States Code*.

Plaintiffs in Civil Action Number 96-963, in which the lead plaintiff is the American Civil Liberties Union (the ACLU),[2] filed their action in the United States District Court for the Eastern District of Pennsylvania on the day the Act was signed, and moved for a temporary restraining order to enjoin enforcement of these two provisions of the CDA. On February 15, 1996, following an evidentiary hearing, Judge Ronald L. Buckwalter, to whom the case had been assigned, granted a limited temporary restraining order, finding in a Memorandum that 47 U.S.C. § 223(a)(1)(B) ("the indecency provision" of the CDA) was unconstitutionally vague. On the same day, Chief Judge Dolores K. Sloviter, Chief Judge of the United States Court of Appeals for the Third Circuit, having been requested by the parties and the district court to convene a three-judge court, pursuant to § 561(a) of the CDA, appointed such a court consisting of, in addition to Judge Buckwalter, Judge Stewart Dalzell of the same district, and herself, as the circuit judge required by 28 U.S.C. § 2284.

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[2] The plaintiffs in this action are the American Civil Liberties Union; Human Rights Watch; Electronic Privacy Information Center; Electronic Frontier Foundation; Journalism Education Association; Computer Professionals for Social Responsibility; National Writers Union; Clarinet Communications Corp.; Institute for Global Communications; Stop Prisoner Rape; AIDS Education Global Information System; Bibliobytes; Queer Resources Directory; Critical Path AIDS Project, Inc.; Wildcat Press, Inc.; Declan McCullagh dba Justice on Campus; Brock Meeks dba Cyberwire Dispatch; John Troyer dba The Safer Sex Page; Jonathan Wallace dba The Ethical Spectacle; and Planned Parenthood Federation of America, Inc. We refer to these plaintiffs collectively as the ACLU.

After a conference with the court, the parties entered into a stipulation, which the court approved on February 26, 1996, wherein the Attorney General agreed that:

> she will not initiate any investigations or prosecutions for violations of 47 U.S.C. § 223(d) for conduct occurring after enactment of this provision until the three-judge court hears Plaintiffs' Motion for Preliminary Injunction . . . and has decided the motion.

The Attorney General's commitment was qualified to the extent that:

> her full authority to investigate or prosecute any violation of § 223(a)(1)(B), *as amended*, and § 223(d) as to conduct which occurs or occurred during any period of time after enactment of these provisions (including for the period of time to which this stipulation applies) should the Court deny plaintiffs' motion or, if the motion is granted, should these provisions ultimately be upheld.

Stipulation, ¶ 4, in C.A. No. 96-963.

Shortly thereafter, the American Library Association, Inc. (the ALA) and others[3] filed a similar action

[3] The plaintiffs in the second action, in addition to the ALA, are: America Online, Inc.; American Booksellers Association, Inc.; American Booksellers Foundation for Free Expression; American Society of Newspaper Editors; Apple Computer, Inc.; Association of American Publishers, Inc.; Association of Publishers, Editors and Writers; Citizens Internet Empowerment Coalition; Commercial Internet Exchange Association; CompuServe Incorporated; Families Against Internet Censorship; Freedom to Read Foundation, Inc.; Health Sciences Libraries Consortium; Hotwired Ventures LLC; Interactive Digital Software Association; Interactive Services Association; Magazine Publishers of America; Microsoft Corporation; The Microsoft Network, L.L.C.; National Press Photographers Association; Netcom On-Line Communication Services, Inc.; Newspaper Association of America; Opnet, Inc.; Prodigy Services Company; Society of Professional Journalists; Wired Ventures, Ltd. We refer to these plaintiffs collectively as the ALA.

The eight counts of the amended complaint in this action focus on the CDA's amendment to 47 U.S.C. § 223, and do not challenge the CDA's amendment of 18 U.S.C. § 1462(c).

at C.A. No. 96-1458. On February 27, 1996, Chief Judge Sloviter, again pursuant to § 561(a) of the CDA and upon request, convened the same three-judge court pursuant to 28 U.S.C. § 2284. The actions were consolidated pursuant to Fed. R. Civ. P. 42(a), "for all matters relating to the disposition of motions for preliminary injunction in these cases, including the hearing on such motions."

The parties were afforded expedited discovery in connection with the motions for preliminary injunction, and they cooperated with Judge Dalzell, who had been assigned the case management aspects of the litigation. While the discovery was proceeding, and with the agreement of the parties, the court began receiving evidence at the consolidated hearings which were conducted on March 21 and 22, and April 1, 12 and 15, 1996. In order to expedite the proceedings, the parties worked closely with Judge Dalzell and arranged to stipulate to many of the underlying facts and to place much of their cases in chief before the court by sworn declarations, so that the hearings were largely devoted to cross-examination of certain of the witnesses whose declarations had been filed. The parties submitted proposed findings of fact and

post-hearing memoranda on April 29, and the court heard extensive oral argument on May 10, 1996.[4]

Statutory Provisions at Issue

Plaintiffs focus their challenge on two provisions of section 502 of the CDA which amend 47 U.S.C. §§ 223(a) and 223(d).

Section 223(a)(1)(B) provides in part that any person in interstate or foreign communications who, "by means of a telecommunications device,"[5] "knowingly

[4] In addition, we have received briefs of *amici curiae* supporting and opposing plaintiffs' contentions. Arguing in favor of our granting the motions for preliminary injunction are Authors Guild, American Society of Journalists and Authors, Ed Carp, Coalition for Positive Sexuality, CONNECTnet, Creative Coalition on AOL, Tri Dang Do, Feminists for Free Expression, Margarita Lacabe, Maggie LaNoue, LoD Communications, Peter Ludlow, Palmer Museum of Art, Chuck More, Rod Morgan, PEN American Center, Philadelphia Magazine, PSINet, Inc., Eric S. Raymond, Reporters Committee for Freedom of the Press, Don Rittner, The Sexuality Information and Education Council of the United States, Lloyd K. Stires, Peter J. Swanson, Kirsti Thomas, Web Communications, and Miryam Ehrlich Williamson. Opposing the motion are the Family Life Project of the American Center for Law and Justice and a group consisting of The National Law Center for Children and Families, Family Research Council, "Enough Is Enough!" Campaign, National Coalition for the Protection of Children and Families, and Morality in Media.

[5] The Act does not define "telecommunications device". By Order dated February 27, 1996, we asked the parties to address whether a modem is a "telecommunications device". Plaintiffs and the Government answered in the affirmative, and we agree that the plain meaning of the phrase and the legislative history of the Act strongly support their conclusion. "Telecommunications" under 47 U.S.C. § 153(48) means "the transmission, between or among points specified by the user, of in-

. . . makes, creates, or solicits" and "initiates the transmission" of "any comment, request, suggestion, proposal, image or other communication which is obscene or *indecent*, knowing that the recipient of the communication is under 18 years of age," "shall be criminally fined or imprisoned." (emphasis added).

Section 223(d)(1) ("the patently offensive provision"), makes it a crime to use an "interactive computer service"[6] to "send" or "display in a manner available" to a person under age 18, "any comment,

formation of the user's choosing, without change in the form of content of the information as sent and received." The plain meaning of "device" is "something that is formed or formulated by design and usu[ally] with consideration of possible alternatives, experiment, and testing." *Webster's Third New International Dictionary*, 618 (1986). Clearly, the sponsors of the CDA thought it would reach individual Internet users, many of whom still connect through modems. *See, e.g.*, 141 Cong.Rec. S8329-46 (daily ed. June 14, 1995) (statements of Sen. Exon and Sen. Coats).

The resolution of the tension between the scope of "telecommunications device" and the scope of "interactive computer service" as defined in 47 U.S.C. § 230(a)(2), *see infra* note 6, must await another day. It is sufficient for us to conclude that the exclusion of § 223(h)(1)(B) is probably a narrow one (as the Government has argued), insulating an interactive computer service from criminal liability under the CDA but not insulating users who traffic in indecent and patently offensive materials on the Internet through those services.

[6] The statute at § 509 amends 47 U.S.C. to add § 230(e)(2), which defines such a service as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."

request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication."

Plaintiffs also challenge on the same grounds the provisions in § 223(a)(2) and § 223(d)(2), which make it a crime for anyone to "knowingly permit[ ] any telecommunications facility under [his or her] control to be used for any activity prohibited" in §§ 223(a)(1)(B) and 223(d)(1). The challenged provisions impose a punishment of a fine, up to two years imprisonment, or both for each offense.

Plaintiffs make clear that they do not quarrel with the statute to the extent that it covers obscenity or child pornography, which were already proscribed before the CDA's adoption. *See* 18 U.S.C. §§ 1464-65 (criminalizing obscene material); *id.* §§ 2251-52 (criminalizing child pornography); *see also New York v. Ferber*, 458 U.S. 747 (1982); *Miller v. California*, 413 U.S. 15 (1973).

Plaintiffs in the ACLU action also challenge the provision of the CDA that criminalizes speech over the Internet that transmits information about abortions or abortifacient drugs and devices, through its amendment of 18 U.S.C. § 1462(c). That section now prohibits the sending and receiving of information over the Internet by any means regarding "where, how, or of whom, or by what means any [drug, medicine, article, or thing designed, adapted, or intended for producing abortion] may be obtained or made". The Government has stated that it does not contest

plaintiffs' challenge to the enforceability of the provision of the CDA as it relates to 18 U.S.C. § 1462(c).[7]

As part of its argument that the CDA passes constitutional muster, the Government cites the CDA's "safe harbor" defenses in new § 223(e) of 47 U.S.C., which provides:

(e) Defenses

In addition to any other defenses available by law:

(1) No person shall be held to have violated subsection (a) or (d) of this section solely for providing access or connection to or from a facility, system, or network not under that person's control, including transmission, downloading, intermediate storage, access software, or other related capabilities that are incidental to providing such access or connection that does not include the creation of the content of the communication.

(2) The defenses provided by paragraph (1) of this subsection shall not be applicable to a person

[7] In the Government's Opposition to plaintiffs' motion for a temporary restraining order in C.A. No. 96-963, it notes "the Department has a longstanding policy that previous such provisions are unconstitutional and will not be enforced", and that both President Clinton and Attorney General Reno "have made th[e] point clear" that no one will be prosecuted under "the abortion-related provision of newly-amended 18 U.S.C. § 1462(c)." Opposition at 19, n.11 (February 14, 1996). In view of this "longstanding policy", the Government contends there is no realistic fear of prosecution and, so the argument goes, no need for equitable relief. *Id.* In their post-hearing brief, the ACLU plaintiffs inform us that in view of the Government's statement, "they do not seek a preliminary injunction against the enforcement of § 1462(c)." Post-Trial Brief of ACLU Plaintiffs at 2 n.2.

who is a conspirator with an entity actively involved in the creation or knowing distribution of communications that violate this section, or who knowingly advertises the availability of such communications.

(3) The defenses provided in paragraph (1) of this subsection shall not be applicable to a person who provides access or connection to a facility, system, or network engaged in the violation of this section that is owned or controlled by such person.

(4) No employer shall be held liable under this section for the actions of an employee or agent unless the employee's or agent's conduct is within the scope of his or her employment or agency and the employer (A) having knowledge of such conduct, authorizes or ratifies such conduct, or (B) recklessly disregards such conduct.

(5) It is a defense to a prosecution under subsection (a)(1)(B) or (d) of this section, or under subsection (a)(2) of this section with respect to the use of a facility for an activity under subsection (a)(1)(B) that a person—

(A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology; or

(B) has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number.

(6) The [Federal Communications] Commission may describe measures which are reasonable, effective, and appropriate to restrict access to prohibited communications under subsection (d) of this section. Nothing in this section authorizes the Commission to enforce, or is intended to provide the Commission with the authority to approve, sanction, or permit, the use of such measures. The Commission shall have no enforcement authority over the failure to utilize such measures. . . .

II.

FINDINGS OF FACT

All parties agree that in order to apprehend the legal questions at issue in these cases, it is necessary to have a clear understanding of the exponentially growing, worldwide medium that is the Internet, which presents unique issues relating to the application of First Amendment jurisprudence and due process requirements to this new and evolving method of communication. For this reason all parties insisted on having extensive evidentiary hearings before the three-judge court. The court's Findings of fact are made pursuant to Fed. R. Civ. P. 52(a). The history and basic technology of this medium are not in dispute, and the first forty-eight paragraphs of the following Findings of fact are derived from the like-

numbered paragraphs of a stipulation[8] the parties filed with the court.[9]

The Nature of Cyberspace

The Creation of the Internet and the Development of Cyberspace

1. The Internet is not a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer networks. It is thus a network of networks. This is best understood if one considers what a linked group of computers—referred to here as a "network"—is, and what it does. Small networks are now ubiquitous (and are often called "local area networks"). For example, in many United States Courthouses, computers are linked to each other for the purpose of exchanging files and messages (and to share equipment such as printers). These are networks.

2. Some networks are "closed" networks, not linked to other computers or networks. Many networks, however, are connected to other networks, which are

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[8] The court again expresses its appreciation to the parties for their cooperative attitude in evolving the stipulation.

[9] The Government has not by motion challenged the standing of any plaintiff in either case, and we harbor no doubts of our own on that point, notwithstanding the Government's suggestion in a footnote of its post-hearing brief. *See* Defendants' Post-Hearing Memorandum at 37 n.46 ("Plaintiffs' assertions as to the speech at issue are so off-point as to raise standing concerns."). Descriptions of these plaintiffs, as well as of the nature and content of the speech they contend is or may be affected by the CDA, are set forth in paragraphs 70 through 356 at pages 30 through 103 of the parties' stipulation filed in these actions. These paragraphs will not be reproduced here, but will be deemed adopted as Findings of the court.

in turn connected to other networks in a manner which permits each computer in any network to communicate with computers on any other network in the system. This global Web of linked networks and computers is referred to as the Internet.

3. The nature of the Internet is such that it is very difficult, if not impossible, to determine its size at a given moment. It is indisputable, however, that the Internet has experienced extraordinary growth in recent years. In 1981, fewer than 300 computers were linked to the Internet, and by 1989, the number stood at fewer than 90,000 computers. By 1993, over 1,000,000 computers were linked. Today, over 9,400,000 host computers worldwide, of which approximately 60 percent located within the United States, are estimated to be linked to the Internet. This count does *not* include the personal computers people use to access the Internet using modems. In all, reasonable estimates are that as many as 40 million people around the world can and do access the enormously flexible communication Internet medium. That figure is expected to grow to 200 million Internet users by the year 1999.

4. Some of the computers and computer networks that make up the Internet are owned by governmental and public institutions, some are owned by non-profit organizations, and some are privately owned. The resulting whole is a decentralized, global medium of communications—or "cyberspace"—that links people, institutions, corporations, and governments around the world. The Internet is an international system. This communications medium allows any of the literally tens of millions of people with access to the Internet to exchange information. These communica-

tions can occur almost instantaneously, and can be directed either to specific individuals, to a broader group of people interested in a particular subject, or to the world as a whole.

5. The Internet had its origins in 1969 as an experimental project of the Advanced Research Project Agency ("ARPA"), and was called ARPANET. This network linked computers and computer networks owned by the military, defense contractors, and university laboratories conducting defense-related research. The network later allowed researchers across the country to access directly and to use extremely powerful supercomputers located at a few key universities and laboratories. As it evolved far beyond its research origins in the United States to encompass universities, corporations, and people around the world, the ARPANET came to be called the "DARPA Internet," and finally just the "Internet."

6. From its inception, the network was designed to be a decentralized, self-maintaining series of redundant links between computers and computer networks, capable of rapidly transmitting communications without direct human involvement or control, and with the automatic ability to re-route communications if one or more individual links were damaged or otherwise unavailable. Among other goals, this redundant system of linked computers was designed to allow vital research and communications to continue even if portions of the network were damaged, say, in a war.

7. To achieve this resilient nationwide (and ultimately global) communications medium, the ARPANET encouraged the creation of multiple links to

and from each computer (or computer network) on the network. Thus, a computer located in Washington, D.C., might be linked (usually using dedicated telephone lines) to other computers in neighboring states or on the Eastern seaboard. Each of those computers could in turn be linked to other computers, which themselves would be linked to other computers.

8. A communication sent over this redundant series of linked computers could travel any of a number of routes to its destination. Thus, a message sent from a computer in Washington, D.C., to a computer in Palo Alto, California, might first be sent to a computer in Philadelphia, and then be forwarded to a computer in Pittsburgh, and then to Chicago, Denver, and Salt Lake City, before finally reaching Palo Alto. If the message could not travel along that path (because of military attack, simple technical malfunction, or other reason), the message would automatically (without human intervention or even knowledge) be re-routed, perhaps, from Washington, D.C. to Richmond, and then to Atlanta, New Orleans, Dallas, Albuquerque, Los Angeles, and finally to Palo Alto. This type of transmission, and re-routing, would likely occur in a matter of seconds.

9. Messages between computers on the Internet do not necessarily travel entirely along the same path. The Internet uses "packet switching" communication protocols that allow individual messages to be subdivided into smaller "packets" that are then sent independently to the destination, and are then automatically reassembled by the receiving computer. While all packets of a given message often travel along the same path to the destination, if computers along the

route become overloaded, then packets can be rerouted to less loaded computers.

10. At the same time that ARPANET was maturing (it subsequently ceased to exist), similar networks developed to link universities, research facilities, businesses, and individuals around the world. These other formal or loose networks included BITNET, CSNET, FIDONET, and USENET. Eventually, each of these networks (many of which overlapped) were themselves linked together, allowing users of any computers linked to any one of the networks to transmit communications to users of computers on other networks. It is this series of linked networks (themselves linking computers and computer networks) that is today commonly known as the Internet.

11. No single entity—academic, corporate, governmental, or non-profit—administers the Internet. It exists and functions as a result of the fact that hundreds of thousands of separate operators of computers and computer networks independently decided to use common data transfer protocols to exchange communications and information with other computers (which in turn exchange communications and information with still other computers). There is no centralized storage location, control point, or communications channel for the Internet, and it would not be technically feasible for a single entity to control all of the information conveyed on the Internet.

How Individuals Access the Internet

12. Individuals have a wide variety of avenues to access cyberspace in general, and the Internet in particular. In terms of physical access, there are two

common methods to establish an actual link to the Internet. First, one can use a computer or computer terminal that is directly (and usually permanently) connected to a computer network that is itself directly or indirectly connected to the Internet. Second, one can use a "personal computer" with a "modem" to connect over a telephone line to a larger computer or computer network that is itself directly or indirectly connected to the Internet. As detailed below, both direct and modem connections are made available to people by a wide variety of academic, governmental, or commercial entities.

13. Students, faculty, researchers, and others affiliated with the vast majority of colleges and universities in the United States can access the Internet through their educational institutions. Such access is often via direct connection using computers located in campus libraries, offices, or computer centers, or may be through telephone access using a modem from a student's or professor's campus or off-campus location. Some colleges and universities install "ports" or outlets for direct network connections in each dormitory room or provide access via computers located in common areas in dormitories. Such access enables students and professors to use information and content provided by the college or university itself, and to use the vast amount of research resources and other information available on the Internet worldwide.

14. Similarly, Internet resources and access are sufficiently important to many corporations and other employers that those employers link their office computer networks to the Internet and provide employees with direct or modem access to the office network

(and thus to the Internet). Such access might be used by, for example, a corporation involved in scientific or medical research or manufacturing to enable corporate employees to exchange information and ideas with academic researchers in their fields.

15. Those who lack access to the Internet through their schools or employers still have a variety of ways they can access the Internet. Many communities across the country have established "free-nets" or community networks to provide their citizens with a local link to the Internet (and to provide local-oriented content and discussion groups). The first such community network, the Cleveland Free-Net Community Computer System, was established in 1986, and free-nets now exist in scores of communities as diverse as Richmond, Virginia, Tallahassee, Florida, Seattle, Washington, and San Diego, California. Individuals typically can access free-nets at little or no cost via modem connection or by using computers available in community buildings. Free-nets are often operated by a local library, educational institution, or non-profit community group.

16. Individuals can also access the Internet through many local libraries. Libraries often offer patrons use of computers that are linked to the Internet. In addition, some libraries offer telephone modem access to the libraries' computers, which are themselves connected to the Internet. Increasingly, patrons now use library services and resources without ever physically entering the library itself. Libraries typically provide such direct or modem access at no cost to the individual user.

17. Individuals can also access the Internet by patronizing an increasing number of storefront "com-

puter coffee shops," where customers—while they drink their coffee—can use computers provided by the shop to access the Internet. Such Internet access is typically provided by the shop for a small hourly fee.

18. Individuals can also access the Internet through commercial and non-commercial "Internet service providers" that typically offer modem telephone access to a computer or computer network linked to the Internet. Many such providers—including the members of plaintiff Commercial Internet Exchange Association—are commercial entities offering Internet access for a monthly or hourly fee. Some Internet service providers, however, are non-profit organizations that offer free or very low cost access to the Internet. For example, the International Internet Association offers free modem access to the Internet upon request. Also, a number of trade or other non-profit associations offer Internet access as a service to members.

19. Another common way for individuals to access the Internet is through one of the major national commercial "online services" such as America Online, CompuServe, the Microsoft Network, or Prodigy. These online services offer nationwide computer networks (so that subscribers can dial-in to a local telephone number), and the services provide extensive and well organized content within their own proprietary computer networks. In addition to allowing access to the extensive content available *within* each online service, the services also allow subscribers to link to the much larger resources of the Internet. Full access to the online service (including access to the Internet) can be obtained for modest monthly or hourly fees. The major commercial online services

have almost twelve million individual subscribers across the United States.

20. In addition to using the national commercial online services, individuals can also access the Internet using some (but not all) of the thousands of local dial-in computer services, often called "bulletin board systems" or "BBSs." With an investment of as little as $2,000.00 and the cost of a telephone line, individuals, non-profit organizations, advocacy groups, and businesses can offer their own dial-in computer "bulletin board" service where friends, members, subscribers, or customers can exchange ideas and information. BBSs range from single computers with only one telephone line into the computer (allowing only one user at a time), to single computers with many telephone lines into the computer (allowing multiple simultaneous users), to multiple linked computers each servicing multiple dial-in telephone lines (allowing multiple simultaneous users). Some (but not all) of these BBS systems offer direct or indirect links to the Internet. Some BBS systems charge users a nominal fee for access, while many others are free to the individual users.

21. Although commercial access to the Internet is growing rapidly, many users of the Internet—such as college students and staff—do not individually pay for access (except to the extent, for example, that the cost of computer services is a component of college tuition). These and other Internet users can access the Internet without paying for such access with a credit card or other form of payment.

Methods to Communicate Over the Internet

22. Once one has access to the Internet, there are a wide variety of different methods of communication and information exchange over the network. These many methods of communication and information retrieval are constantly evolving and are therefore difficult to categorize concisely. The most common methods of communications on the Internet (as well as within the major online services) can be roughly grouped into six categories:

(1) one-to-one messaging (such as "e-mail"),

(2) one-to-many messaging (such as "listserv"),

(3) distributed message databases (such as "USENET newsgroups"),

(4) real time communication (such as "Internet Relay Chat"),

(5) real time remote computer utilization (such as "telnet"), and

(6) remote information retrieval (such as "ftp," "gopher," and the "World Wide Web").

Most of these methods of communication can be used to transmit text, data, computer programs, sound, visual images (*i.e.*, pictures), and moving video images.

23. One-to-one messaging. One method of communication on the Internet is via electronic mail, or "e-mail," comparable in principle to sending a first class letter. One can address and transmit a message to one or more other people. E-mail on the Internet is not routed through a central control point, and can

take many and varying paths to the recipients. Unlike postal mail, simple e-mail generally is not "sealed" or secure, and can be accessed or viewed on intermediate computers between the sender and recipient (unless the message is encrypted).

24. One-to-many messaging. The Internet also contains automatic mailing list services (such as "listservs"), [also referred to by witnesses as "mail exploders"] that allow communications about particular subjects of interest to a group of people. For example, people can subscribe to a "listserv" mailing list on a particular topic of interest to them. The subscriber can submit messages on the topic to the listserv that are forwarded (via e-mail), either automatically or through a human moderator overseeing the listserv, to anyone who has subscribed to the mailing list. A recipient of such a message can reply to the message and have the reply also distributed to everyone on the mailing list. This service provides the capability to keep abreast of developments or events in a particular subject area. Most listserv-type mailing lists automatically forward all incoming messages to all mailing list subscribers. There are thousands of such mailing list services on the Internet, collectively with hundreds of thousands of subscribers. Users of "open" listservs typically can add or remove their names from the mailing list automatically, with no direct human involvement. Listservs may also be "closed," *i.e.*, only allowing for one's acceptance into the listserv by a human moderator.

25. Distributed message databases. Similar in function to listservs—but quite different in how communications are transmitted—are distributed mes-

sage databases such as "USENET newsgroups." User-sponsored newsgroups are among the most popular and widespread applications of Internet services, and cover all imaginable topics of interest to users. Like listservs, newsgroups are open discussions and exchanges on particular topics. Users, however, need not subscribe to the discussion mailing list in advance, but can instead access the database at any time. Some USENET newsgroups are "moderated" but most are open access. For the moderated newsgroups,[10] all messages to the newsgroup are forwarded to one person who can screen them for relevance to the topics under discussion. USENET newsgroups are disseminated using ad hoc, peer to peer connections between approximately 200,000 computers (called USENET "servers") around the world. For unmoderated newsgroups, when an individual user with access to a USENET server posts a message to a newsgroup, the message is automatically forwarded to all adjacent USENET servers that furnish access to the newsgroup, and it is then propagated to the servers adjacent to those servers, etc. The messages are temporarily stored on each receiving server, where they are available for review and response by individual users. The messages are automatically and periodically purged from each system after a time to make room for new messages. Responses to messages, like the original messages, are automatically distributed to all other computers receiving the newsgroup or forwarded to a moderator in the case of a moderated newsgroup. The dissemina-

[10] It became clear from the testimony that moderated newsgroups are the exception and unmoderated newsgroups are the rule.

tion of messages to USENET servers around the world is an automated process that does not require direct human intervention or review.

26. There are newsgroups on more than fifteen thousand different subjects. In 1994, approximately 70,000 messages were posted to newsgroups each day, and those messages were distributed to the approximately 190,000 computers or computer networks that participate in the USENET newsgroup system. Once the messages reach the approximately 190,000 receiving computers or computer networks, they are available to individual users of those computers or computer networks. Collectively, almost 100,000 new messages (or "articles") are posted to newsgroups each day.

27. Real time communication. In addition to transmitting messages that can be later read or accessed, individuals on the Internet can engage in an immediate dialog, in "real time", with other people on the Internet. In its simplest forms, "talk" allows one-to-one communications and "Internet Relay Chat" (or IRC) allows two or more to type messages to each other that almost immediately appear on the others' computer screens. IRC is analogous to a telephone party line, using a computer and keyboard rather than a telephone. With IRC, however, at any one time there are thousands of different party lines available, in which collectively tens of thousands of users are engaging in conversations on a huge range of subjects. Moreover, one can create a new party line to discuss a different topic at any time. Some IRC conversations are "moderated" or include "channel operators."

28. In addition, commercial online services such as America Online, CompuServe, the Microsoft Network, and Prodigy have their own "chat" systems allowing their members to converse.

29. Real time remote computer utilization. Another method to use information on the Internet is to access and control remote computers in "real time" using "telnet." For example, using telnet, a researcher at a university would be able to use the computing power of a supercomputer located at a different university. A student can use telnet to connect to a remote library to access the library's online card catalog program.

30. Remote information retrieval. The final major category of communication may be the most well known use of the Internet—the search for and retrieval of information located on remote computers. There are three primary methods to locate and retrieve information on the Internet.

31. A simple method uses "ftp" (or file transfer protocol) to list the names of computer files available on a remote computer, and to transfer one or more of those files to an individual's local computer.

32. Another approach uses a program and format named "gopher" to guide an individual's search through the resources available on a remote computer.

The World Wide Web

33. A third approach, and fast becoming the most well-known on the Internet, is the "World Wide Web." The Web utilizes a "hypertext" formatting language called hypertext markup language (HTML), and programs that "browse" the Web can display HTML

documents containing text, images, sound, animation and moving video. Any HTML document can include links to other types of information or resources, so that while viewing an HTML document that, for example, describes resources available on the Internet, one can "click" using a computer mouse on the description of the resource and be immediately connected to the resource itself. Such "hyperlinks" allow information to be accessed and organized in very flexible ways, and allow people to locate and efficiently view related information even if the information is stored on numerous computers all around the world.

34. Purpose. The World Wide Web (W3C) was created to serve as the platform for a global, online store of knowledge, containing information from a diversity of sources and accessible to Internet users around the world. Though information on the Web is contained in individual computers, the fact that each of these computers is connected to the Internet through W3C protocols allows all of the information to become part of a single body of knowledge. It is currently the most advanced information system developed on the Internet, and embraces within its data model most informat[illegible] in previous networked information systems such as ftp, gopher, wais, and Usenet.

35. History. W3C was originally developed at CERN, the European Particle Physics Laboratory, and was initially used to allow information sharing within internationally dispersed teams of researchers and engineers. Originally aimed at the High Energy Physics community, it has spread to other areas and attracted much interest in user support, resource

recovery, and many other areas which depend on collaborative and information sharing. The Web has extended beyond the scientific and academic community to include communications by individuals, non-profit organizations, and businesses.

36. Basic Operation. The World Wide Web is a series of documents stored in different computers all over the Internet. Documents contain information stored in a variety of formats, including text, still images, sounds, and video. An essential element of the Web is that any document has an address (rather like a telephone number). Most Web documents contain "links." These are short sections of text or image which refer to another document. Typically the linked text is blue or underlined when displayed, and when selected by the user, the referenced document is automatically displayed, wherever in the world it actually is stored. Links for example are used to lead from overview documents to more detailed documents, from tables of contents to particular pages, but also as cross-references, footnotes, and new forms of information structure.

37. Many organizations now have "home pages" on the Web. These are documents which provide a set of links designed to represent the organization, and through links from the home page, guide the user directly or indirectly to information about or relevant to that organization.

38. As an example of the use of links, if these Findings were to be put on a World Wide Web site, its home page might contain links such as those:

* THE NATURE OF CYBERSPACE

* CREATION OF THE INTERNET AND THE DEVELOPMENT OF CYBERSPACE
* HOW PEOPLE ACCESS THE INTERNET
* METHODS TO COMMUNICATE OVER THE INTERNET

39. Each of these links takes the user of the site from the beginning of the Findings to the appropriate section within this Adjudication. Links may also take the user from the original Web site to another Web site on another computer connected to the Internet. These links from one computer to another, from one document to another across the Internet, are what unify the Web into a single body of knowledge, and what makes the Web unique. The Web was designed with a maximum target time to follow a link of one tenth of a second.

40. Publishing. The World Wide Web exists fundamentally as a platform through which people and organizations can communicate through shared information. When information is made available, it is said to be "published" on the Web. Publishing on the Web simply requires that the "publisher" has a computer connected to the Internet and that the computer is running W3C server software. The computer can be as simple as a small personal computer costing less than $1500 dollars or as complex as a multi-million dollar mainframe computer. Many Web publishers choose instead to lease disk storage space from someone else who has the necessary computer facilities, eliminating the need for actually owning any equipment oneself.

41. The Web, as a universe of network accessible information, contains a variety of documents prepared

with quite varying degrees of care, from the hastily typed idea, to the professionally executed corporate profile. The power of the Web stems from the ability of a link to point to any document, regardless of its status or physical location.

42. Information to be published on the Web must also be formatted according to the rules of the Web standards. These standardized formats assure that all Web users who want to read the material will be able to view it. Web standards are sophisticated and flexible enough that they have grown to meet the publishing needs of many large corporations, banks, brokerage houses, newspapers and magazines which now publish "online" editions of their material, as well as government agencies, and even courts, which use the Web to disseminate information to the public. At the same time, Web publishing is simple enough that thousands of individual users and small community organizations are using the Web to publish their own personal "home pages," the equivalent of individualized newsletters about that person or organization, which are available to everyone on the Web.

43. Web publishers have a choice to make their Web sites open to the general pool of all Internet users, or close them, thus making the information accessible only to those with advance authorization. Many publishers choose to keep their sites open to all in order to give their information the widest potential audience. In the event that the publishers choose to maintain restrictions on access, this may be accomplished by assigning specific user names and passwords as a prerequisite to access to the site. Or, in the case of Web sites maintained for internal use of

one organization, access will only be allowed from other computers within that organization's local network.[11]

44. Searching the Web. A variety of systems have developed that allow users of the Web to search particular information among all of the public sites that are part of the Web. Services such as Yahoo, Magellan, Altavista, Webcrawler, and Lycos are all services known as "search engines" which allow users to search for Web sites that contain certain categories of information, or to search for key words. For example, a Web user looking for the text of Supreme Court opinions would type the words "Supreme Court" into a search engine, and then be presented with a list of World Wide Web sites that contain Supreme Court information. This list would actually be a series of links to those sites. Having searched out a number of sites that might contain the desired information, the user would then follow individual links, browsing through the information on each site, until the desired material is found. For many content providers on the Web, the ability to be found by these search engines is very important.

45. Common standards. The Web links together disparate information on an ever-growing number of Internet-linked computers by setting common information storage formats (HTML) and a common language for the exchange of Web documents (HTTP). Although the information itself may be in many different formats, and stored on computers which are

[11] The evidence adduced at the hearings provided detail to this paragraph of the parties' stipulation. *See* Findings 95 to 107.

not otherwise compatible, the basic Web standards provide a basic set of standards which allow communication and exchange of information. Despite the fact that many types of computers are used on the Web, and the fact that many of these machines are otherwise incompatible, those who "publish" information on the Web are able to communicate with those who seek to access information with little difficulty because of these basic technical standards.

46. A distributed system with no centralized control. Running on tens of thousands of individual computers on the Internet, the Web is what is known as a distributed system. The Web was designed so that organizations with computers containing information can become part of the Web simply by attaching their computers to the Internet and running appropriate World Wide Web software. No single organization controls any membership in the Web, nor is there any single centralized point from which individual Web sites or services can be blocked from the Web. From a user's perspective, it may appear to be a single, integrated system, but in reality it has no centralized control point.

47. Contrast to closed databases. The Web's open, distributed, decentralized nature stands in sharp contrast to most information systems that have come before it. Private information services such as Westlaw, Lexis/Nexis, and Dialog, have contained large storehouses of knowledge, and can be accessed from the Internet with the appropriate passwords and access software. However, these databases are not linked together into a single whole, as is the World Wide Web.

48. Success of the Web in research, education, and political activities. The World Wide Web has become so popular because of its open, distributed, and easy-to-use nature. Rather than requiring those who seek information to purchase new software or hardware, and to learn a new kind of system for each new database of information they seek to access, the Web environment makes it easy for users to jump from one set of information to another. By the same token, the open nature of the Web makes it easy for publishers to reach their intended audiences without having to know in advance what kind of computer each potential reader has, and what kind of software they will be using.

Restricting Access to Unwanted On-Line Material[12]

PICS

49. With the rapid growth of the Internet, the increasing popularity of the Web, and the existence of material online that some parents may consider inappropriate for their children, various entities have begun to build systems intended to enable parents to control the material which comes into their homes

[12] Testimony adduced at the hearing suggests that market forces exist to limit the availability of material on-line that parents consider inappropriate for their children. Although the parties sharply dispute the efficacy of so-called "parental empowerment" software, there is a sufficiently wide zone of agreement on what is available to restrict access to unwanted sites that the parties were able to enter into twenty-one paragraphs of stipulated facts on the subject, which form the basis of paragraphs 49 through 69 of our Findings of fact. Because of the rapidity of developments in this field, some of the technological facts we have found may become partially obsolete by the time of publication of these Findings.

and may be accessible to their children. The World Wide Web Consortium launched the PICS ("Platform for Internet Content Selection") program in order to develop technical standards that would support parents' ability to filter and screen material that their children see on the Web.

50. The Consortium intends that PICS will provide the ability for third parties, as well as individual content providers, to rate content on the Internet in a variety of ways. When fully implemented, PICS-compatible World Wide Web browsers, Usenet News Group readers, and other Internet applications, will provide parents the ability to choose from a variety of rating services, or a combination of services.

51. PICS working group [PICS-WG] participants include many of the major online services providers, commercial internet access providers, hardware and software companies, major internet content providers, and consumer organizations. Among active participants in the PICS effort are:

Adobe Systems, Inc.
Apple Computer
America Online
AT&T
Center for Democracy and Technology
CompuServe
Delphi Internet Services
Digital Equipment Corporation
IBM
First floor
First Virtual Holdings Incorporated
France Telecom
FTP Software

Industrial Technology Research Institute of Taiwan
Information Technology Association of America
Institut National de Recherche en Informatique et en Automatique (INRIA)
Interactive Services Association
MCI
Microsoft
MIT/LCS/World Wide Web Consortium
NCD
NEC
Netscape Communications Corporation
NewView
O'Reilly and Associates
Open Market
Prodigy Services Company
Progressive Networks
Providence Systems/Parental Guidance
Recreational Software Advisory Council
SafeSurf
SoftQuad, Inc.
Songline Studios
Spyglass
SurfWatch Software
Telequip Corp.
Time Warner Pathfinder
Viacom Nickelodeon[13]

52. Membership in the PICS-WG includes a broad cross-section of companies from the computer, communications, and content industries, as well as trade

[13] This membership is constantly growing, according to the testimony of Albert Vezza, Chairman of the World Wide Web Consortium. *See also* Defendants' Ex. D-167.

associations and public interest groups. PICS technical specifications have been agreed to, allowing the Internet community to begin to deploy products and services based on the PICS-standards.

53. Until a majority of sites on the Internet have been rated by a PICS rating service, PICS will initially function as a "positive" ratings system in which only those sites that have been rated will be displayed using PICS compatible software. In other words, PICS will initially function as a site *inclusion* list rather than a site *exclusion* list. The default configuration for a PICS compatible Internet application will be to block access to all sites which have not been rated by a PICS rating service, while allowing access to sites which have a PICS rating for appropriate content.[14]

Software

54. For over a year, various companies have marketed stand alone software that is intended to enable parents and other adults to limit the Internet access of children. Examples of such software include: Cyber Patrol, CYBERsitter, The Internet Filter, Net Nanny, Parental Guidance, SurfWatch, Netscape Proxy Server, and WebTrack. The market for this type of software is growing, and there is increasing competition among software providers to provide products.

Cyber Patrol

55. As more people, particularly children, began to use the Internet, Microsystems Software, Inc. de-

[14] *See also* Defendants' Ex. D-174 and the testimony of Mr. Vezza.

cided to develop and market Internet software intended to empower parents to exercise individual choice over what material their children could access. Microsystems' stated intent is to develop a product which would give parents comfort that their children can reap the benefits of the Internet while shielding them from objectionable or otherwise inappropriate materials based on the parents' own particular tastes and values. Microsystems' product, Cyber Patrol, was developed to address this need.

56. Cyber Patrol was first introduced in August 1995, and is currently available in Windows and Macintosh versions. Cyber Patrol works with both direct Internet Access providers (ISPs, e.g., Netcom, PSI, UUnet), and Commercial Online Service Providers (e.g., America Online, CompuServ, Prodigy, Microsoft). Cyber Patrol is also compatible with all major World Wide Web browsers on the market (e.g., Netscape, Navigator, Mosaic, Prodigy's Legacy and Skimmer browsers, America Online, Netcom's NetCruiser, etc.). Cyber Patrol was the first parental empowerment application to be compatible with the PICS standard. In February of 1996, Microsystems put the first PICS ratings server on the Internet.

57. The CyberNOT list contains approximately 7000 sites in twelve categories. The software is designed to enable parents to selectively block access to any or all of the twelve CyberNOT categories simply by checking boxes in the Cyber Patrol Headquarters (the Cyber Patrol program manager). These categories are:

Violence/Profanity: Extreme cruelty, physical or emotional acts against any animal or person which are primarily intended to hurt or inflict pain.

Obscene words, phrases, and profanity defined as text that uses George Carlin's seven censored words more often than once every fifty messages or pages.

Partial Nudity: Full or partial exposure of the human anatomy except when exposing genitalia.

Nudity: Any exposure of the human genitalia.

Sexual Acts (graphic or text): Pictures or text exposing anyone or anything involved in explicit sexual acts and lewd and lascivious behavior, including masturbation, copulation, pedophilia, intimacy and involving nude or partially nude people in heterosexual, bisexual, lesbian or homosexual encounters. Also includes phone sex ads, dating services, adult personals, CD-ROM and videos.

Gross Depictions (graphic or text): Pictures or descriptive text of anyone or anything which are crudely vulgar, deficient in civility or behavior, or showing scatological impropriety. Includes such depictions as maiming, bloody figures, indecent depiction of bodily functions.

Racism/Ethnic Impropriety: Prejudice or discrimination against any race or ethnic culture. Ethnic or racist jokes and slurs. Any text that elevates one race over another.

Satanic/Cult: Worship of the devil; affinity for evil, wickedness. Sects or groups that potentially coerce individuals to grow, and keep, membership.

Drugs/Drug Culture: Topics dealing with the use of illegal drugs for entertainment. This would

exclude current illegal drugs used for medicinal purposes (e.g., drugs used to treat victims of AIDS). Includes substances used for other than their primary purpose to alter the individual's state of mind such as glue sniffing.

Militant/Extremist: Extremely aggressive and combative behaviors, radicalism, advocacy of extreme political measures. Topics include extreme political groups that advocate violence as a means to achieve their goal.

Gambling: Of or relating to lotteries, casinos, betting, numbers games, on-line sports or financial betting including non-monetary dares.

Questionable/Illegal: Material or activities of a dubious nature which may be illegal in any or all jurisdictions, such as illegal business schemes, chain letters, software piracy, and copyright infringement.

Alcohol, Beer & Wine: Material pertaining to the sale or consumption of alcoholic beverages. Also includes sites and information relating to tobacco products.

58. Microsystems employs people to search the Internet for sites containing material in these categories. Since new sites are constantly coming online, Microsystems updates the CyberNOT list on a weekly basis. Once installed on the home PC, the copy of Cyber Patrol receives automatic updates to the CyberNOT list over the Internet every seven days.

59. In February of 1996, Microsystems signed a licensing arrangement with CompuServe, one of the leading commercial online services with over 4.3 million subscribers. CompuServe provides Cyber Patrol free of charge to its subscribers. Microsystems the same month signed a licensing arrangement with Prodigy, another leading commercial online service with over 1.4 million subscribers. Prodigy will provide Cyber Patrol free of charge of its subscribers.

60. Cyber Patrol is also available directly from Microsystems for $49.95, which includes a six month subscription to the CyberNOT blocked sites list (updated automatically once every seven days). After six months, parents can receive six months of additional updates for $19.95, or twelve months for $29.95. Cyber Patrol Home Edition, a limited version of Cyber Patrol, is available free of charge on the Internet. To obtain either version, parents download a seven day demonstration version of the full Cyber Patrol product from the Microsystems Internet World Wide Web Server. At the end of the seven day trial period, users are offered the opportunity to purchase the complete version of Cyber Patrol or provide Microsystems some basic demographic information in exchange for unlimited use of the Home Edition. The demographic information is used for marketing and research purposes. Since January of 1996, over 10,000 demonstration copies of Cyber Patrol have been downloaded from Microsystems' Web site.

61. Cyber Patrol is also available from Retail outlets as NetBlocker Plus. NetBlocker Plus sells for $19.95, which includes five weeks of updates to the CyberNOT list.

62. Microsystems also sells Cyber Patrol into a growing market in schools. As more classrooms become connected to the Internet, many teachers want to ensure that their students can receive the benefit of the Internet without encountering material they deem educationally inappropriate.

63. Microsystems is working with the Recreational Software Advisory Council (RSAC), a nonprofit corporation which developed rating systems for video games, to implement the RSAC rating system for the Internet.

64. The next release of Cyber Patrol, expected in second quarter of this year, will give parents the ability to use any PICS rating service, including the RSAC rating service, in addition to the Microsystems CyberNOT list.

65. In order to speed the implementation of PICS and encourage the development of PICS-compatible Internet applications, Microsystems maintains a server on the Internet which contains its CyberNOT list. The server provides software developers with access to a PICS rating service, and allows software developers to test their products' ability to interpret standard PICS labels. Microsystems is also offering its PICS client test program for Windows free of charge. The client program can be used by developers of PICS rating services to test their services and products.

SurfWatch

66. Another software product, SurfWatch, is also designed to allow parents and other concerned users to filter unwanted material on the Internet. SurfWatch is available for both Apple Macintosh, Microsoft Windows, and Microsoft Windows 95 Operating Systems, and works with direct Internet Access Providers (e.g., Netcom, PSI, UUnet, AT&T, and more than 1000 other Internet Service Providers).

67. The suggested retail price of SurfWatch Software is $49.95, with a street price of between $20.00 and $25.00. The product is also available as part of CompuServe/Spry Inc.'s Internet in a Box for Kids, which includes access to Spry's Kids only Internet service and a copy of SurfWatch. Internet in a Box for Kids retails for approximately $30.00. The subscription service, which updates the SurfWatch blocked site list automatically with new sites each month, is available for $5.95 per month or $60.00 per year. The subscription is included as part of the Internet in a Box for Kids program, and is also provided as a low-cost option from Internet Service Providers.

68. SurfWatch is available at over 12,000 retail locations, including National stores such as Comp USA, Egghead Software, Computer City, and several national mail order outlets. SurfWatch can also be ordered directly from its own site on the World Wide Web, and through the Internet Shopping Network.

69. Plaintiffs America Online (AOL), Microsoft Network, and Prodigy all offer parental control options free of charge to their members. AOL has established an online area designed specifically for children. The "Kids Only" parental control feature allows parents to establish an AOL account for their

children that accesses only the Kids Only channel on America Online.[15]

70. AOL plans to incorporate PICS-compatible capability into its standard Web browser software, and to make available to subscribers other PICS-compatible Web browsers, such as the Netscape software.

71. Plaintiffs CompuServe and Prodigy give their subscribers the option of blocking all access to the Internet, or to particular media within their proprietary online content, such as bulletin boards and chat rooms.

72. Although parental control software currently can screen for certain suggestive words or for known sexually explicit sites, it cannot now screen for sexually explicit images unaccompanied by suggestive text unless those who configure the software are aware of the particular site.

73. Despite its limitations, currently available user-based software suggests that a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be widely available.

Content on the Internet

74. The types of content now on the Internet defy easy classification. The entire card catalogue of the Carnegie Library is on-line, together with journals, journal abstracts, popular magazines, and titles of

[15] From this point, our Findings are, unless noted, no longer based upon the parties' stipulation, but upon the record adduced at the hearings.

compact discs. The director of the Carnegie Library, Robert Croneberger, testified that on-line services are the emerging trend in libraries generally. Plaintiff Hotwired Ventures LLC organizes its Web site into information regarding travel, news and commentary, arts and entertainment, politics, and types of drinks. Plaintiff America Online, Inc., not only creates chat rooms for a broad variety of topics, but also allows members to create their own chat rooms to suit their own tastes. The ACLU uses an America Online chat room as an unmoderated forum for people to debate civil liberties issues. Plaintiffs' expert, Scott Bradner,[16] estimated that 15,000 newsgroups exist today, and he described his own interest in a newsgroup devoted solely to Formula 1 racing cars. America Online makes 15,000 bulletin boards available to its subscribers, who post between 200,000 and 250,000 messages each day. Another plaintiffs' expert, Harold Rheingold, participates in "virtual communities" that simulate social interaction. It is no exaggeration to conclude that the content on the Internet is as diverse as human thought.

75. The Internet is not exclusively, or even primarily, a means of commercial communication. Many commercial entities maintain Web sites to inform potential consumers about their goods and services, or to solicit purchases, but many other Web sites exist solely for the dissemination of non-commercial information. The other forms of Internet communica-

[16] Mr. Bradner is a member of the Internet Engineering Task Force, the group primarily responsible for Internet technical standards, as well as other Internet-related associations responsible for, among other things, the prevailing Internet Protocols. He is also associated with Harvard University.

tion—e-mail, bulletin boards, newsgroups, and chat rooms—frequently have non-commercial goals. For the economic and technical reasons set forth in the following paragraphs, the Internet is an especially attractive means for not-for-profit entities or public interest groups to reach their desired audiences. There are examples in the parties' stipulation of some of the non-commercial uses that the Internet serves. Plaintiff Human Rights Watch, Inc., offers information on its Internet site regarding reported human rights abuses around the world. Plaintiff National Writers Union provides a forum for writers on issues of concern to them. Plaintiff Stop Prisoner Rape, Inc., posts text, graphics, and statistics regarding the incidence and prevention of rape in prisons. Plaintiff Critical Path AIDS Project, Inc., offers information on safer sex, the transmission of HIV, and the treatment of AIDS.

76. Such diversity of content on the Internet is possible because the Internet provides an easy and inexpensive way for a speaker to reach a large audience, potentially of millions. The start-up and operating costs entailed by communication on the Internet are significantly lower than those associated with use of other forms of mass communication, such as television, radio, newspapers, and magazines. This enables operation of their own Web sites not only by large companies, such as Microsoft and Time Warner, but also by small, not-for-profit groups, such as Stop Prisoner Rape and Critical Path AIDS Project. The Government's expert, Dr. Dan R. Olsen,[17] agreed that

[17] Dr. Olsen chairs the Computer Science Department at Brigham Young University in Provo, Utah, and is the recently-appointed Director of the Human Computer Interaction Institute at Carnegie-Mellon University in Pittsburgh, Pennsylvania.

creation of a Web site would cost between $1,000 and $15,000, with monthly operating costs depending on one's goals and the Web site's traffic. Commercial online services such as America Online allow subscribers to create Web pages free of charge. Any Internet user can communicate by posting a message to one of the thousands of newsgroups and bulletin boards or by engaging in an on-line "chat", and thereby reach an audience worldwide that shares an interest in a particular topic.

77. The ease of communication through the Internet is facilitated by the use of hypertext markup language (HTML), which allows for the creation of "hyperlinks" or "links". HTML enables a user to jump from one source to other related sources by clicking on the link. A link might take the user from Web site to Web site, or to other files within a particular Web site. Similarly, by typing a request into a search engine, a user can retrieve many different sources of content related to the search that the creators of the engine have collected.

78. Because of the technology underlying the Internet, the statutory term "content provider,"[18] which is equivalent to the traditional "speaker," may actually be a hybrid of speakers. Through the use of HTML, for example, Critical Path and Stop Prisoner Rape link their Web sites to several related data-

[18] The term "information content provider" is defined in § 509 of the CDA, at the new 47 U.S.C. § 230(e)(3), as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."

bases, and a user can immediately jump from the home pages of these organizations to the related databases simply by clicking on a link. America Online creates chat rooms for particular discussions but also allows subscribers to create their own chat rooms. Similarly, a newsgroup gathers postings on a particular topic and distributes them to the newsgroup's subscribers. Users of the Carnegie Library can read on-line versions of *Vanity Fair* and *Playboy*, and America Online's subscribers can peruse the *New York Times*, *Boating*, and other periodicals. Critical Path, Stop Prisoner Rape, America Online and the Carnegie Library all make available content of other speakers over whom they have little or no editorial control.

79. Because of the different forms of Internet communication, a user of the Internet may speak or listen interchangeably, blurring the distinction between "speakers" and "listeners" on the Internet. Chat rooms, e-mail, and newsgroups are interactive forms of communication, providing the user with the opportunity both to speak and to listen.

80. It follows that unlike traditional media, the barriers to entry as a speaker on the Internet do not differ significantly from the barriers to entry as a listener. Once one has entered cyberspace, one may engage in the dialogue that occurs there. In the *argot* of the medium, the receiver can and does become the content provider, and vice-versa.

81. The Internet is therefore a unique and wholly new medium of worldwide human communication.

Sexually Explicit Material On the Internet

82. The parties agree that sexually explicit material exists on the Internet. Such material includes text, pictures, and chat, and includes bulletin boards, newsgroups, and the other forms of Internet communication, and extends from the modestly titillating to the hardest-core.

83. There is no evidence that sexually-oriented material is the primary type of content on this new medium. Purveyors of such material take advantage of the same ease of access available to all users of the Internet, including establishment of a Web site.

84. Sexually explicit material is created, named, and posted in the same manner as material that is not sexually explicit. It is possible that a search engine can accidentally retrieve material of a sexual nature through an imprecise search, as demonstrated at the hearing. Imprecise searches may also retrieve irrelevant material that is not of a sexual nature. The accidental retrieval of sexually explicit material is one manifestation of the larger phenomenon of irrelevant search results.

85. Once a provider posts content on the Internet, it is available to all other Internet users worldwide. Similarly, once a user posts a message to a newsgroup or bulletin board, that message becomes available to all subscribers to that newsgroup or bulletin board. For example, when the UCR/California Museum of Photography posts to its Web site nudes by Edward Weston and Robert Mapplethorpe to announce that its new exhibit will travel to Baltimore and New York City, those images are available not only in Los Angeles, Baltimore, and New York City, but also in Cincinnati, Mobile, or Beijing—wherever Internet users live. Similarly, the safer sex instructions that

Critical Path posts to its Web site, written in street language so that the teenage receiver can understand them, are available not just in Philadelphia, but also in Provo and Prague. A chat room organized by the ACLU to discuss the United States Supreme Court's decision in *FCC v. Pacifica Foundation* would transmit George Carlin's seven dirty words to anyone who enters. Messages posted to a newsgroup dedicated to the Oklahoma City bombing travel to all subscribers to that newsgroup.

86. Once a provider posts its content on the Internet, it cannot prevent that content from entering any community. Unlike the newspaper, broadcast station, or cable system, Internet technology necessarily gives a speaker a potential worldwide audience. Because the Internet is a network of networks (as described above in Findings 1 through 4), any network connected to the Internet has the capacity to send and receive information to any other network. Hotwired Ventures, for example, cannot prevent its materials on mixology from entering communities that have no interest in that topic.

87. Demonstrations at the preliminary injunction hearings showed that it takes several steps to enter cyberspace. At the most fundamental level, a user must have access to a computer with the ability to reach the Internet (typically by way of a modem). A user must then direct the computer to connect with the access provider, enter a password, and enter the appropriate commands to find particular data. On the World Wide Web, a user must normally use a search engine or enter an appropriate address. Similarly, accessing newsgroups, bulletin boards, and chat rooms requires several steps.

88. Communications over the Internet do not "invade" an individual's home or appear on one's computer screen unbidden. Users seldom encounter content "by accident." A document's title or a description of the document will usually appear before the document itself takes the step needed to view it, and in many cases the user will receive detailed information about a site's content before he or she need take the step to access the document. Almost all sexually explicit images are preceded by warnings as to the content. Even the Government's witness, Agent Howard Schmidt, Director of the Air Force Office of Special Investigation, testified that the "odds are slim" that a user would come across a sexually explicit site by accident.

89. Evidence adduced at the hearing showed significant differences between Internet communications and communications received by radio or television. Although content on the Internet is just a few clicks of a mouse away from the user, the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial. A child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended.

Obstacles to Age Verification on the Internet

90. There is no effective way to determine the identity or the age of a user who is accessing material through e-mail, mail exploders, newsgroups or chat rooms. An e-mail address provides no authoritative information about the addressee, who may use an e-mail "alias" or an anonymous remailer. There is also no universal or reliable listing of e-mail addresses and corresponding names or telephone num-

bers, and any such listing would be or rapidly become incomplete. For these reasons, there is no reliable way in many instances for a sender to know if the e-mail recipient is an adult or a minor. The difficulty of e-mail age verification is compounded for mail exploders such as listservs, which automatically send information to all e-mail addresses on a sender's list. Government expert Dr. Olsen agreed that no current technology could give a speaker assurance that only adults were listed in a particular mail exploder's mailing list.

91. Because of similar technological difficulties, individuals posting a message to a newsgroup or engaging in chat room discussions cannot ensure that all readers are adults, and Dr. Olsen agreed. Although some newsgroups are moderated, the moderator's control is limited to what is posted and the moderator cannot control who receives the messages.

92. The Government offered no evidence that there is a reliable way to ensure that recipients and participants in such fora can be screened for age. The Government presented no evidence demonstrating the feasibility of its suggestion that chat rooms, newsgroups and other fora that contain material deemed indecent could be effectively segregated to "adult" or "moderated" areas of cyberspace.

93. Even if it were technologically feasible to block minors' access to newsgroups and similar fora, there is no method by which the creators of newsgroups which contain discussions of art, politics or any other subject that could potentially elicit "indecent" contributions could limit the blocking of access by minors to such "indecent" material and still allow them access to the remaining content, even if the

overwhelming majority of that content was not indecent.

94. Likewise, participants in MUDs (Multi-User Dungeons) and MUSEs (Multi-User Simulation Environments) do not know whether the other participants are adults or minors. Although MUDs and MUSEs require a password for permanent participants, they need not give their real name nor verify their age, and there is no current technology to enable the administrator of these fantasy worlds to know if the participant is an adult or a minor.

95. Unlike other forms of communication on the Internet, there is technology by which an operator of a World Wide Web server may interrogate a user of a Web site. An HTML document can include a fill-in-the-blank "form" to request information from a visitor to a Web site, and this information can be transmitted back to the Web server and be processed by a computer program, usually a Common Gateway Interface (cgi) script. The Web server could then grant or deny access to the information sought. The cgi script is the means by which a Web site can process a fill-in form and thereby screen visitors by requesting a credit card number or adult password.

96. Content providers who publish on the World Wide Web via one of the large commercial online services, such as America Online or CompuServe, could not use an online age verification system that requires cgi script because the server software of these online services available to subscribers cannot process cgi scripts. There is no method currently available for Web page publishers who lack access to cgi scripts to screen recipients online for age.

The Practicalities of the Proffered Defenses

Note: The Government contends the CDA makes available three potential defenses to all content providers on the Internet: credit card verification, adult verification by password or adult identification number, and "tagging".

Credit Card Verification

97. Verification[19] of a credit card number over the Internet is not now technically possible. Witnesses testified that neither Visa nor Mastercard considers the Internet to be sufficiently secure under the current technology to process transactions in that manner. Although users can and do purchase products over the Internet by transmitting their credit card number, the seller must then process the transaction with Visa or Mastercard off-line using phone lines in the traditional way. There was testimony by several witnesses that Visa and Mastercard are in the process of developing means of credit card verification over the Internet.

98. Verification by credit card, if and when operational, will remain economically and practically unavailable for many of the non-commercial plaintiffs in these actions. The Government's expert "suspect[ed]" that verification agencies would decline to process a card unless it accompanied a commercial transaction. There was no evidence to the contrary.

99. There was evidence that the fee charged by verification agencies to process a card, whether for a purchase or not, will preclude use of the credit-card verification defense by many non-profit, non-commercial Web sites, and there was no evidence to the contrary. Plaintiffs' witness Patricia Nell Warren, an author whose free Web site allows users to purchase gay and lesbian literature, testified that she

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[19] By "verification", we mean the method by which a user types in his or her credit card number, and the Web site ensures that the credit card is valid before it allows the user to enter the site.

must pay $1 per verification to a verification agency. Her Web site can absorb this cost because it arises in connection with the sale of books available there.

100. Using credit card possession as a surrogate for age, and requiring use of a credit card to enter a site, would impose a significant economic cost on non-commercial entities. Critical Path, for example, received 3,300 hits daily from February 4 through March 4, 1996. If Critical Path must pay a fee every time a user initially enters its site, then, to provide free access to its non-commercial site, it would incur a monthly cost far beyond its modest resources. The ACLU's Barry Steinhardt testified that maintenance of a credit card verification system for all visitors to the ACLU's Web site would require it to shut down its Web site because the projected cost would exceed its budget.

101. Credit card verification would significantly delay the retrieval of information on the Internet. Dr. Olsen, the expert testifying for the Government, agreed that even "a minute is [an] absolutely unreasonable [delay] . . . [P]eople will not put up with a minute." Plaintiffs' expert Donna Hoffman similarly testified that excessive delay disrupts the "flow" on the Internet and stifles both "hedonistic" and "goal-directed" browsing.

102. Imposition of a credit card requirement would completely bar adults who do not have a credit card and lack the resources to obtain one from accessing any blocked material. At this time, credit card verification is effectively unavailable to a substantial number of Internet content providers as a potential defense to the CDA.

Adult Verification by Password

103. The Government offered very limited evidence regarding the operation of existing age verification systems, and the evidence offered was not based on personal knowledge. AdultCheck and Verify, existing systems which appear to be used for accessing commercial pornographic sites, charge users for their services. Dr. Olsen admitted that his knowledge of these services was derived primarily from reading the advertisements on their Web pages. He had not interviewed any employees of these entities, had not personally used these systems, had no idea how many people are registered with them, and could not testify to the reliability of their attempt at age verification.

104. At least some, if not almost all, non-commercial organizations, such as the ACLU, Stop Prisoner Rape or Critical Path AIDS Project, regard charging listeners to access their speech as contrary to their goals of making their materials available to a wide audience free of charge.

105. It would not be feasible for many non-commercial organizations to design their own adult access code screening systems because the administrative burden of creating and maintaining a screening system and the ongoing costs involved is beyond their reach. There was testimony that the costs would be prohibitive even for a commercial entity such as HotWired, the online version of Wired magazine.

106. There is evidence suggesting that adult users, particularly casual Web browsers, would be discouraged from retrieving information that required use of a credit card or password. Andrew Anker testified that HotWired has received many complaints

from its members about HotWired's registration system, which requires only that a member supply a name, e-mail address and self-created password. There is concern by commercial content providers that age verification requirements would decrease advertising and revenue because advertisers depend on a demonstration that the sites are widely available and frequently visited.

107. Even if credit card verification or adult password verification were implemented, the Government presented no testimony as to how such systems could ensure that the user of the password or credit card is in fact over 18. The burdens imposed by credit card verification and adult password verification systems make them effectively unavailable to a substantial number of Internet content providers.

The Government's "Tagging" Proposal

108. The feasibility and effectiveness of "tagging" to restrict children from accessing "indecent" speech, as proposed by the Government has not been established. "Tagging" would require content providers to label all of their "indecent" or "patently offensive" material by imbedding a string of characters, such as "XXX," in either the URL or HTML. If a user could install software on his or her computer to recognize the "XXX" tag, the user could screen out any content with that tag. Dr. Olsen proposed a "-L18" tag, an idea he developed for this hearing in response to Mr. Bradner's earlier testimony that certain tagging would not be feasible.

109. The parties appear to agree that it is technologically feasible—"trivial", in the words of plaintiffs' expert—to imbed tags in URLs and HTML,

and the technology of tagging underlies both plaintiffs' PICS proposal and the Government's "-L18" proposal.

110. The Government's tagging proposal would require all content providers that post arguably "indecent" material to review all of their online content, a task that would be extremely burdensome for organizations that provide large amounts of material online which cannot afford to pay a large staff to review all of that material. The Carnegie Library would be required to hire numerous additional employees to review its online files at an extremely high cost to its limited budget. The cost and effort would be substantial for the Library and frequently prohibitive for others. Witness Kiroshi Kuromiya testified that it would be impossible for his organization, Critical Path, to review all of its material because it has only one full and one part-time employee.

111. The task of screening and tagging cannot be done simply by using software which screens for certain words, as Dr. Olsen acknowledged, and we find that determinations as to what is indecent require human judgment.

112. In lieu of reviewing each file individually, a content provider could tag its entire site but this would prevent minors from accessing much material that is not "indecent" under the CDA.

113. To be effective, a scheme such as the -L18 proposal would require a worldwide consensus among speakers to use the same tag to label "indecent" material. There is currently no such consensus, and no Internet speaker currently labels its speech with

the -L18 code or with any other widely-recognized label.

114. Tagging also assumes the existence of software that recognizes the tags and takes appropriate action when it notes tagged speech. Neither commercial Web browsers nor user-based screening software is currently configured to block a -L18 code. Until such software exists, all speech on the Internet will continue to travel to whomever requests it, without hindrance. Labelling speech has no effect in itself on the transmission (or not) of that speech. Neither plaintiffs nor the Government suggest that tagging alone would shield minors from speech or insulate a speaker from criminal liability under the CDA. It follows that all speech on any topic that is available to adults will also be available to children using the Internet (unless it is blocked by screening software running on the computer the child is using).

115. There is no way that a speaker can use current technology to know if a listener is using screening software.

116. Tags can not currently activate or deactivate themselves depending on the age or location of the receiver. Critical Path, which posts on-line safer sex instructions, would be unable to imbed tags that block its speech only in communities where it may be regarded as indecent. Critical Path, for example, must choose either to tag its site (blocking its speech in all communities) or not to tag, blocking its speech in none.

The Problems of Offshore Content and Caching

117. A large percentage, perhaps 40% or more, of content on the Internet originates outside the United States. At the hearing, a witness demonstrated how an Internet user could access a Web site of London (which presumably is on a server in England), and then link to other sites of interest in England. A user can sometimes discern from a URL that content is coming from overseas, since InterNIC allows a content provider to imbed a country code in a domain name.[20] Foreign content is otherwise indistinguishable from domestic content (as long as it is in English), since foreign speech is created, named, and posted in the same manner as domestic speech. There is no requirement that foreign speech contain a country code in its URL. It is undisputed that some foreign speech that travels over the Internet is sexually explicit.

118. The use of "caching" makes it difficult to determine whether the material originated from foreign or domestic sources. Because of the high cost of using the trans-Atlantic and trans-Pacific cables, and because the high demand on those cables leads to bottleneck delays, content is often "cached", or temporarily stored, on servers in the United States. Material from a foreign source in Europe can travel

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[20] InterNIC is a naming organization, not a regulator of content. InterNIC and two other European organizations maintain a master list of domain names to ensure that no duplication occurs. Creators of Web sites must register their domain name with InterNIC, and the agency will instruct the creator to choose another name if the new Web site has the name of an already-existing site. InterNIC has no control over content on a site after registration.

over the trans-Atlantic cable to the receiver in the United States, and pass through a domestic caching server which then stores a copy for subsequent retrieval. This domestic caching server, rather than the original foreign server, will send the material from the cache to the subsequent receivers, without placing a demand on the trans-oceanic cables. This shortcut effectively eliminates most of the distance for both the request and the information and, hence, most of the delay. The caching server discards the stored information according to its configuration (*e.g.*, after a certain time or as the demand for the information diminishes). Caching therefore advances core Internet values: the cheap and speedy retrieval of information.

119. Caching is not merely an international phenomenon. Domestic content providers store popular domestic material on their caching servers to avoid the delay of successive searches for the same material and to decrease the demand on their Internet connection. America Online can cache the home page of the *New York Times* on its servers when a subscriber first requests it, so that subsequent subscribers who make the same request will receive the same home page, but from America Online's caching service rather than from the *New York Times*'s server.[21]

120. Put simply, to follow the example in the prior paragraph, America Online has no control over the

[21] This paragraph and the preceding paragraph also illustrate that a content provider might store its own material or someone else's on a caching server. The goal—saving money and time—is the same in both cases.

content that the *New York Times* posts to its Web site, and the *New York Times* has no control over America Online's distribution of that content from a caching server.

Anonymity

121. Anonymity is important to Internet users who seek to access sensitive information, such as users of the Critical Path AIDS Project's Web site, the users, particularly gay youth, of Queer Resources Directory, and users of Stop Prisoner Rape (SPR). Many members of SPR's mailing list have asked to remain anonymous due to the stigma of prisoner rape.

Plaintiffs' Choices Under the CDA

122. Many speakers who display arguably indecent content on the Internet must choose between silence and the risk of prosecution. The CDA's defenses—credit card verification, adult access codes, and adult personal identification numbers—are effectively unavailable for non-commercial, not-for-profit entities.

123. The plaintiffs in this action are businesses, libraries, non-commercial and not-for-profit organizations, and educational societies and consortia. Although some of the material that plaintiffs post online—such as information regarding protection from AIDS, birth control or prison rape—is sexually explicit and may be considered "indecent" or "patently offensive" in some communities, none of the plaintiffs is a commercial purveyor of what is commonly termed "pornography."

III.

CONCLUSIONS OF LAW

Plaintiffs have established a reasonable probability of eventual success in the litigation by demonstrating that §§ 223(a)(1)(B) and 223(a)(2) of the CDA are unconstitutional on their face to the extent that they reach indecency. Sections 223(d)(1) and 223(d)(2) of the CDA are unconstitutional on their face. Accordingly, plaintiffs have shown irreparable injury, no party has any interest in the enforcement of an unconstitutional law, and therefore the public interest will be served by granting the preliminary injunction. *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976); *Hohe v. Casey*, 868 F.2d 69, 72 (3d Cir.), *cert. denied*, 493 U.S. 848 (1989); *Acierno v. New Castle County*, 40 F.3d 645, 653 (3d Cir. 1994). The motions for preliminary injunction will therefore be granted.

The views of the members of the Court in support of these conclusions follow.

SLOVITER, Chief Judge, Court of Appeals for the Third Circuit:

A.

Statutory Provisions

As noted in Part I, Introduction, the plaintiffs' motion for a preliminary injunction is confined to portions of two provisions of the Communications Decency Act of 1996, § 223(a) and § 223(d), which they contend violate their First Amendment free speech and Fifth Amendment due process rights. To facilitate reference, I set forth those provisions in full. Section 223(a), the "indecency" provision, subjects to

criminal penalties of imprisonment of no more than two years or a fine or both anyone who:

> 1) in interstate or foreign communications
>
> . . .
>
> (B) by means of a telecommunications device knowingly—
>
> (i) makes, creates, or solicits, and
>
> (ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene *or indecent*, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication; . . .
>
> (2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity.

(emphasis added).

The term "telecommunications device" is specifically defined not to include "the use of an interactive computer service," as that is covered by section 223(d)(1).

Section 223(d), the "patently offensive" provision, subjects to criminal penalties anyone who:

> (1) in interstate or foreign communications knowingly—

(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or

(B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image or other communication that, *in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs*, regardless of whether the use of such service placed the call or initiated the communication; or

(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity.

(emphasis added).

Two aspects of these provisions stand out. First, we are dealing with criminal provisions, subjecting violators to substantial penalties. Second, the provisions on indecent and patently offensive communications are not parallel.

The government uses the term "indecent" interchangeably with "patently offensive" and advises that it so construes the statute in light of the legislative history and the Supreme Court's analysis of the word "indecent" in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). However, the CDA does not define "indecent." Notwithstanding Congress' familiarity with *Pacifica*, it enacted § 223(a), covering "indecent" communications, without any language confining "indecent" to descriptions or depictions of "sexual or excretory activities or organs," language it included in the reference to "patently offensive" in § 223(d)(1)(B). Nor does § 223(a) contain the phrase "in context," which the government believes is relevant.

The failure to define "indecent" in § 223(a) is thus arguably a negative pregnant and subject to "the rule of construction that an express statutory requirement here, contrasted with statutory silence there, shows an intent to confine the requirement to the specified instance." *Field v. Mans*, 116 S.Ct. 437, 442 (1995). *See also Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

Plaintiffs note the difference but do not press this as a basis for distinguishing between the two sections in their preliminary injunction arguments and therefore I will also use the words interchangeably for this purpose, leaving open the issue for consideration at the final judgment stage if it becomes relevant.

B.

Preliminary Injunction Standard

To obtain a preliminary injunction, plaintiffs must establish that they are likely to prevail on the merits and that they will suffer irreparable harm if injunctive relief is not granted. We also must consider whether the potential harm to the defendant from issuance of a temporary restraining order outweighs

possible harm to the plaintiffs if such relief is denied, and whether the granting of injunctive relief is in the public interest. *See Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 90-91 (3d Cir. 1992); *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1175 (3d Cir. 1990).

In a case in which the injury alleged is a threat to First Amendment interests, the finding of irreparable injury is often tied to the likelihood of success on the merits. In *Elrod v. Burns*, 427 U.S. 347 (1976), the Supreme Court emphasized that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* at 373 (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)).

Subjecting speakers to criminal penalties for speech that is constitutionally protected in itself raises the spectre of irreparable harm. Even if a court were unwilling to draw that conclusion from the language of the statute itself, plaintiffs have introduced ample evidence that the challenged provisions, if not enjoined, will have a chilling effect on their free expression. Thus, this is not a case in which we are dealing with a mere incidental inhibition on speech, *see Hohe v. Casey*, 868 F.2d 69, 73 (3d Cir.), *cert. denied*, 493 U.S. 848 (1989), but with a regulation that directly penalizes speech.

Nor could there be any dispute about the public interest factor which must be taken into account before a court grants a preliminary injunction. No long string of citations is necessary to find that the public interest weighs in favor of having access to a free flow of constitutionally protected speech. *See, e.g., Turner Broadcasting System, Inc. v. FCC*, 114 S.Ct. 2445, 2458 (1994); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 763-65 (1976).

Thus, if plaintiffs have shown a likelihood of success on the merits, they will have shown the irreparable injury needed to entitle them to a preliminary injunction.

C.

Applicable Standard of Review

The CDA is patently a government-imposed content-based restriction on speech, and the speech at issue, whether denominated "indecent" or "patently offensive," is entitled to constitutional protection. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). As such, the regulation is subject to strict scrutiny, and will only be upheld if it is justified by a compelling government interest and if it is narrowly tailored to effectuate that interest. *Sable*, 492 U.S. at 126; *see also Turner Broadcasting*, 114 S.Ct. at 2459 (1994). "[T]he benefit gained [by a content-based restriction] must outweigh the loss of constitutionally protected rights." *Elrod v. Burns*, 427 U.S. at 363.

The government's position on the applicable standard has been less than pellucid but, despite some references to a somewhat lesser burden employed in broadcasting cases, it now appears to have conceded that it has the burden of proof to show both a compelling interest and that the statute regulates least restrictively. Tr. of Preliminary Injunction Hearing at 121 (May 10, 1996). In any event, the evidence and our Findings of Fact based thereon show that Internet communication, while unique, is more

akin to telephone communication, at issue in *Sable*, than to broadcasting, at issue in *Pacifica*, because, as with the telephone, an Internet user must act affirmatively and deliberately to retrieve specific information online. Even if a broad search will, on occasion, retrieve unwanted materials, the user virtually always receives some warning of its content, significantly reducing the element of surprise or "assault" involved in broadcasting. Therefore, it is highly unlikely that a very young child will be randomly "surfing" the Web and come across "indecent" or "patently offensive" material.

Judge Dalzell's separate opinion fully explores the reasons for the differential treatment of radio and television broadcasting for First Amendment purposes from that accorded other means of communication. It follows that to the extent the Court employed a less than strict scrutiny standard of review in *Pacifica* and other broadcasting cases, *see, e.g.*, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), there is no reason to employ a less than strict scrutiny standard of review in this case.

D.

The Nature of the Government's Interest

The government asserts that shielding minors from access to indecent materials is the compelling interest supporting the CDA. It cites in support the statements of the Supreme Court that "[i]t is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling,'" *New York v. Ferber*, 458 U.S. 747, 757 (1982) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607

(1982)), and "there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards." *Sable*, 492 U.S. at 126. It also cites the similar quotation appearing in *Fabulous Assoc., Inc. v. Pennsylvania Public Utility Comm'n*, 896 F.2d 780, 787 (3d Cir. 1990).

Those statements were made in cases where the potential harm to children from the material was evident. *Ferber* involved the constitutionality of a statute which prohibited persons from knowingly promoting sexual performances by children under 16 and distributing material depicting such performances. *Sable* and *Fabulous* involved the FCC's ban on "dial-a-porn" (dealing by definition with pornographic telephone messages). In contrast to the material at issue in those cases, at least some of the material subject to coverage under the "indecent" and "patently offensive" provisions of the CDA may contain valuable literary, artistic or educational information of value to older minors as well as adults. The Supreme Court has held that "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-213 (1975) (citations omitted).

In *Erznoznik*, the Court rejected an argument that an ordinance prohibiting the display of films containing nudity at drive-in movie theatres served a compelling interest in protecting minor passersby from the influence of such films. The Court held that

the prohibition was unduly broad, and explained that "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." 422 U.S. at 213-14. As Justice Scalia noted in *Sable*, "[t]he more pornographic what is embraced within the . . . category of 'indecency,' the more reasonable it becomes to insist upon greater assurance of insulation from minors." *Sable*, 492 U.S. at 132 (Scalia, J., concurring). It follows that where non-pornographic, albeit sexually explicit, material also falls within the sweep of the statute, the interest will not be as compelling.

In part, our consideration of the government's showing of a "compelling interest" trenches upon the vagueness issue, discussed in detail in Judge Buckwalter's opinion but equally pertinent to First Amendment analysis. Material routinely acceptable according to the standards of New York City, such as the Broadway play *Angels in America* which concerns homosexuality and AIDS portrayed in graphic language, may be far less acceptable in smaller, less cosmopolitan communities of the United States. Yet the play garnered two Tony Awards and a Pulitzer prize for its author, and some uninhibited parents and teachers might deem it to be material to be read or assigned to eleventh and twelfth graders. If available on the Internet through some libraries, the text of the play would likely be accessed in that manner by at least some students, and it would also arguably fall within the scope of the CDA.

There has been recent public interest in the female genital mutilation routinely practiced and officially

condoned in some countries. News articles have been descriptive, and it is not stretching to assume that this is a subject that occupies news groups and chat rooms on the Internet. We have no assurance that these discussions, of obvious interest and relevance to older teenage girls, will not be viewed as patently offensive—even in context—in some communities.

Other illustrations abound of non-obscene material likely to be available on the Internet but subject to the CDA's criminal provisions. Photographs appearing in National Geographic or a travel magazine of the sculptures in India of couples copulating in numerous positions, a written description of a brutal prison rape, or Francesco Clemente's painting "Labirinth," *see* Def. Exh. 125, all might be considered to "depict or describe, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." 47 U.S.C. § 223(d)(1). But the government has made no showing that it has a compelling interest in preventing a seventeen-year-old minor from accessing such images.

By contrast, plaintiffs presented testimony that material that could be considered indecent, such as that offered by Stop Prisoner Rape or Critical Path AIDS project, may be critically important for certain older minors. For example, there was testimony that one quarter of all new HIV infections in the United States is estimated to occur in young people between the ages of 13 and 20, an estimate the government made no effort to rebut. The witnesses believed that graphic material that their organizations post on the Internet could help save lives, but were concerned about the CDA's effect on their right to do so.

The government counters that this court should defer to legislative conclusions about this matter. However, where First Amendment rights are at stake, "[d]eference to a legislative finding cannot limit judicial inquiry." *Sable*, 492 U.S. at 129 (quoting *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978)). "[W]hatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law." *Id.*

Moreover, it appears that the legislative "findings" the government cites concern primarily testimony and statements by legislators about the prevalence of obscenity, child pornography, and sexual solicitation of children on the Internet. Similarly, at the hearings before us the government introduced exhibits of sexually explicit material through the testimony of Agent Howard Schmidt, which consisted primarily of the same type of hard-core pornographic materials (even if not technically obscene) which concerned Congress and which fill the shelves of "adult" book and magazine stores. Plaintiffs emphasize that they do not challenge the Act's restrictions on speech not protected by the First Amendment, such as obscenity, child pornography or harassment of children. Their suit is based on their assertion, fully supported by their evidence and our findings, that the CDA reaches much farther.

I am far less confident than the government that its quotations from earlier cases in the Supreme Court signify that it has shown a compelling interest in regulating the vast range of online material covered or potentially covered by the CDA. Nonetheless, I acknowledge that there is certainly a compelling

government interest to shield a substantial number of minors from some of the online material that motivated Congress to enact the CDA, and do not rest my decision on the inadequacy of the government's showing in this regard.

E.

The Reach of the Statute

Whatever the strength of the interest the government has demonstrated in preventing minors from accessing "indecent" and "patently offensive" material online, if the means it has chosen sweeps more broadly than necessary and thereby chills the expression of adults, it has overstepped onto rights protected by the First Amendment. *Sable*, 492 U.S. at 131.

The plaintiffs argue that the CDA violates the First Amendment because it effectively bans a substantial category of protected speech from most parts of the Internet. The government responds that the Act does not on its face or in effect ban indecent material that is constitutionally protected for adults. Thus one of the factual issues before us was the likely effect of the CDA on the free availability of constitutionally protected material. A wealth of persuasive evidence, referred to in detail in the Findings of Fact, proved that it is either technologically impossible or economically prohibitive for many of the plaintiffs to comply with the CDA without seriously impeding their posting of online material which adults have a constitutional right to access.

With the possible exception of an e-mail to a known recipient, most content providers cannot determine the identity and age of every user accessing their

material. Considering separately content providers that fall roughly into two categories, we have found that no technology exists which allows those posting on the category of newsgroups, mail exploders or chat rooms to screen for age. Speakers using those forms of communication cannot control who receives the communication, and in most instances are not aware of the identity of the recipients. If it is not feasible for speakers who communicate via these forms of communication to conduct age screening, they would have to reduce the level of communication to that which is appropriate for children in order to be protected under the statute. This would effect a complete ban even for adults of some expression, albeit "indecent," to which they are constitutionally entitled, and thus would be unconstitutional under the holding in *Sable*, 492 U.S. at 131.

Even as to content providers in the other broad category, such as the World Wide Web, where efforts at age verification are technically feasible through the use of Common Gateway Interface (cgi) scripts (which enable creation of a document that can process information provided by a Web visitor), the Findings of Fact show that as a practical matter, non-commercial organizations and even many commercial organizations using the Web would find it prohibitively expensive and burdensome to engage in the methods of age verification proposed by the government, and that even if they could attempt to age verify, there is little assurance that they could successfully filter out minors.

The government attempts to circumvent this problem by seeking to limit the scope of the statute to those content providers who are commercial pornographers, and urges that we do likewise in our obligation to save a congressional enactment from facial unconstitutionality wherever possible. But in light of its plain language and its legislative history, the CDA cannot reasonably be read as limited to commercial pornographers. A court may not impose a narrowing construction on a statute unless it is "readily susceptible" to such a construction. *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988). The court may not "rewrite a . . . law to conform it to constitutional requirements." *Id.* Although we may prefer an interpretation of a statute that will preserve the constitutionality of the statutory scheme, *United States v. Clark*, 445 U.S. 23, 27 (1980), we do not have license to rewrite a statute to "create distinctions where none were intended." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 72 n.6 (1982); *see also Consumer Party v. Davis*, 778 F.2d 140, 147 (3d Cir. 1985). The Court has often stated that "absent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive." *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984) (quoting *North Dakota v. United States*, 460 U.S. 300, 312 (1983)).

It is clear from the face of the CDA and from its legislative history that Congress did not intend to limit its application to commercial purveyors of pornography. Congress unquestionably knew how to limit the statute to such entities if that was its intent, and in fact it did so in provisions relating to dial-a-porn services. *See* 47 U.S.C. § 223(b)(2)(A) (criminalizing making any indecent telephone communication "*for commercial purposes*"). It placed no

similar limitation in the CDA. Moreover, the Conference Report makes clear that Congress did not intend to limit the application of the statute to content providers such as those which make available the commercial material contained in the goverment's exhibits, and confirms that Congress intended "content regulation of both commercial and non-commercial providers." Conf. Rep. at 191. *See also*, 141 Cong. Rec. S8089 (daily ed. June 9, 1995) (Statement of Senator Exon).

The scope of the CDA is not confined to material that has a prurient interest or appeal, one of the hallmarks of obscenity, because Congress sought to reach farther. Nor did Congress include language that would define "patently offensive" or "indecent" to exclude material of serious value. It follows that to narrow the statute in the manner the government urges would be an impermissible exercise of our limited judicial function, which is to review the statute as written for its compliance with constitutional mandates.

I conclude inexorably from the foregoing that the CDA reaches speech subject to the full protection of the First Amendment, at least for adults.[1] In questions of the witnesses and in colloquy with the government attorneys, it became evident that even if "indecent" is read as parallel to "patently offensive," the terms would cover a broad range of material from contemporary films, plays and books showing or

[1] It also probably covers speech protected by the First Amendment for some minors a [*sic*] well, because it fails to limit its reach to that which is harmful for minors, an issue which it is not necessary to decide in light of the other conclusions reached.

describing sexual activities (*e.g.*, *Leaving Las Vegas*) to controversial contemporary art and photographs showing sexual organs in positions that the government conceded would be patently offensive in some communities (*e.g.*, a Robert Mapplethorpe photograph depicting a man with an erect penis).

We have also found that there is no effective way for many Internet content providers to limit the effective reach of the CDA to adults because there is no realistic way for many providers to ascertain the age of those accessing their materials. As a consequence, we have found that "[m]any speakers who display arguably indecent content on the Internet must choose between silence and the risk of prosecution." Such a choice, forced by sections 223(a) and (d) of the CDA, strikes at the heart of speech of adults as well as minors.

F.

Whether CDA is Narrowly Tailored

In the face of such a patent intrusion on a substantial category of protected speech for adults, there is some irony in considering whether the statute is narrowly tailored or, as sometimes put, whether Congress has used the least restrictive means to achieve a compelling government interest. *See Sable*, 492 U.S. at 126. It would appear that the extent of the abridgement of the protected speech of adults that it has been shown the CDA would effect is too intrusive to be outweighed by the government's asserted interest, whatever its strength, in protecting minors from access to indecent material. Nonetheless, the formulation of the inquiry requires that we consider the

government's assertion that the statute is narrowly drafted, and I proceed to do so.

In this case, the government relies on the statutory defenses for its argument of narrow tailoring. There are a number of reasons why I am not persuaded that the statutory defenses can save the CDA from a conclusion of facial unconstitutionality.

First, it is difficult to characterize a criminal statute that hovers over each content provider, like the proverbial sword of Damocles, as a narrow tailoring. Criminal prosecution, which carries with it the risk of public obloquy as well as the expense of court preparation and attorneys' fees, could itself cause incalculable harm. No provider, whether an individual, non-profit corporation, or even large publicly held corporation, is likely to willingly subject itself to prosecution for a miscalculation of the prevalent community standards or for an error in judgment as to what is indecent. A successful defense to a criminal prosecution would be small solace indeed.

Credit card and adult verification services are explicitly referred to as defenses in § 223(e)(5)(B) of the CDA. As is set forth fully in the detailed Findings of Fact, these defenses are not technologically or economically feasible for most providers.

The government then falls back on the affirmative defense to prosecution provided in § 223(e)(5)(A) for a person who "has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections . . . including any method which is feasible under available technology." The government emphasizes

that "effective" does not require 100% restriction, and that this defense is "open-ended" and requires only reasonable efforts based on current technology.

But, as the evidence made clear, there is no such technology at this time. The government proffered as one option that would constitute a valid affirmative defense under § 223(e)(5)(A) a "tagging" scheme conceived by Dr. Olsen in response to this lawsuit whereby a string of characters would be imbedded in all arguably indecent or patently offensive material. Our Findings of Fact set forth fully the reasons why we found that the feasibility and effectiveness of tagging in the manner proposed by the government has not been established. All parties agree that tagging alone does nothing to prevent children from accessing potentially indecent material, because it depends upon the cooperation of third parties to block the material on which the tags are embedded. Yet these third parties, over which the content providers have no control, are not subject to the CDA. I do not believe a statute is narrowly tailored when it subjects to potential criminal penalties those who must depend upon third parties for the effective operation of a statutory defense.

Most important, the government's "tagging" proposal is purely hypothetical and offers no currently operative defense to Internet content providers. At this time, there is no agreed-upon "tag" in existence, and no web browsers or user-based screening systems are now configured to block tagged material. Nor, significantly, has the government stipulated that a content provider could avoid liability simply by tagging its material.

Third, even if the technology catches up, as the government confidently predicts, there will still be a not insignificant burden attached to effecting a tagging defense, a burden one should not have to bear in order to transmit information protected under the constitution. For example, to effect tagging content providers must review all of their material currently published online, as well as all new material they post in the future, to determine if it could be considered "patently offensive" in any community nationwide. This would be burdensome for all providers, but for the many not-for-profit entities which currently post thousands of Web pages, this burden would be one impossible to sustain.

Finally, the viability of the defenses is intricately tied to the clarity of the CDA's scope. Because, like Judge Buckwalter, and for many of the reasons he gives, I believe that "indecent" and "patently offensive" are inherently vague, particularly in light of the government's inability to identify the relevant community by whose standards the material will be judged, I am not persuaded by the government that the statutory defenses in § 223(e) provide effective protection from the unconstitutional reach of the statute.

Minors would not be left without any protection from exposure to patently unsuitable material on the Internet should the challenged provisions of the CDA be preliminarily enjoined. Vigorous enforcement of current obscenity and child pornography laws should suffice to address the problem the government identified in court and which concerned Congress. When the CDA was under consideration by Congress, the Justice Department itself communicated its view

that it was not necessary because it was prosecuting online obscenity, child pornography and child solicitation under existing laws, and would continue to do so.[2] It follows that the CDA is not narrowly tailored, and the government's attempt to defend it on that ground must fail.

G.

Preliminary Injunction

When Congress decided that material unsuitable for minors was available on the Internet, it could have chosen to assist and support the development of technology that would enable parents, schools, and libraries to screen such material from their end. It did not do so, and thus did not follow the example available in the print media where non-obscene but indecent and patently offensive books and magazines abound. Those responsible for minors undertake the primary obligation to prevent their exposure to such material. Instead, in the CDA Congress chose to place on the speakers the obligation of screening the material that would possibly offend some communities.

Whether Congress' decision was a wise one is not at issue here. It was unquestionably a decision that placed the CDA in serious conflict with our most cherished protection—the right to choose the material to which we would have access.

The government makes what I view as an extraordinary argument in its brief. It argues that block-

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[2] *See* 141 Cong. Rec. S8342 (daily ed. June 14, 1995) (letter from Kent Markus, Acting Assistant Attorney General, U.S. Department of Justice, to Senator Leahy).

ing technology needed for effective parental control is not yet widespread but that it "will imminently be in place." Government's Post-hearing Memorandum at 66. It then states that if we uphold the CDA, it "will likely unleash the 'creative genius' of the Internet community to find a myriad of possible solutions." I can imagine few arguments less likely to persuade a court to uphold a criminal statute than one that depends on future technology to cabin the reach of the statute within constitutional bounds.

The government makes yet another argument that troubles me. It suggests that the concerns expressed by the plaintiffs and the questions posed by the court reflect an exaggerated supposition of how it would apply the law, and that we should, in effect, trust the Department of Justice to limit the CDA's application in a reasonable fashion that would avoid prosecution for placing on the Internet works of serious literary or artistic merit. That would require a broad trust indeed from a generation of judges not far removed from the attacks on James Joyce's *Ulysses* as obscene. *See United States v. One Book Entitled Ulysses*, 72 F.2d 705 (2d Cir. 1934); *see also Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Mass.*, 383 U.S. 413 (1966). Even if we were to place confidence in the reasonable judgment of the representatives of the Department of Justice who appeared before us, the Department is not a monolithic structure, and individual U.S. Attorneys in the various districts of the country have or appear to exercise some independence, as reflected by the Department's tolerance of duplicative challenges in this very case.

But the bottom line is that the First Amendment should not be interpreted to require us to entrust the protection it affords to the judgment of prosecutors. Prosecutors come and go. Even federal judges are limited to life tenure. The First Amendment remains to give protection to future generations as well. I have no hesitancy in concluding that it is likely that plaintiffs will prevail on the merits of their argument that the challenged provisions of the CDA are facially invalid under both the First and Fifth Amendments.

BUCKWALTER, District Judge:

A.

I believe that plaintiffs should prevail in this litigation.

My conclusion differs in part from my original memorandum filed in conjunction with the request for a Temporary Restraining Order. As part of the expedited review (per § 561 of the CDA), and in contrast to the limited documentation available to me at the time of the T.R.O. hearing, we have now gathered voluminous evidence presented by way of sworn declarations, live testimony, demonstrative evidence, and other exhibits.[1] Based upon our findings of fact

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[1] If by virtue of the statute's authorization of expedited review of its constitutionality, "*on its face*," 47 U.S.C. § 561(a), we were strictly limited to looking at the words of the statute, I would stand by my T.R.O. opinion. However, in light of the procedures which are required by 47 U.S.C. § 561(a) and 28 U.S.C. § 2284, and were followed by this court in establishing an extensive record in this case, to ignore the evidence presented would be to ignore what an action for injunctive relief is all about.

derived from careful consideration of that evidence, I now conclude that this statute is overbroad and does not meet the strict scrutiny standard in *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989).

More specifically, I now find that current technology is inadequate to provide a safe harbor to most speakers on the Internet. On this issue, I concur in Chief Judge Sloviter's opinion. In addition, I continue to believe that the word "indecent" is unconstitution-

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Section 561 reads as follows:

§ 561. EXPEDITED REVIEW.

(a) THREE-JUDGE DISTRICT COURT HEARING—

Notwithstanding any other provision of law, any civil action challenging the constitutionality, on its face, of this title or any amendment made by this title, or any provision thereof, shall be heard by a district court of 3 judges convened pursuant to the provisions of section 2284 of title 28, United States Code.

Section 2284 states, in relevant part:

§ 2284. Three-judge court; when required; composition; procedure

(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows: . . .

(3) A single judge may conduct all proceedings except the trial. . . . He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damages will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. . . .

ally vague, and I find that the terms "in context" and "patently offensive" also are so vague as to violate the First and Fifth Amendments.

It is, of course, correct that statutes that attempt to regulate the content of speech presumptively violate the First Amendment. *See e.g. R.A.V. v. City of Saint Paul*, 505 U.S. 377, 381 (1992). That is as it should be. The prohibition against Government's regulation of speech cannot be set forth any clearer than in the language of the First Amendment itself. I suspect, however, that it may come as a surprise to many people who have not followed the evolution of constitutional law that, by implication at least, the First Amendment provides that Congress shall make no law abridging the freedom of speech *unless that law advances a compelling governmental interest.*[2] Our cherished freedom of speech does not cover as broad a spectrum as one may have gleaned from a simple reading of the Amendment.[3]

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[2] Justice Kennedy argues in his opinion in *Simon & Schuster v. New York Crime Victims Bd.*, 502 U.S. 105, 120 (1991), that "[t]he regulated content has the full protection of the First Amendment and this, I submit, is itself a full and sufficient reason for holding the statute unconstitutional. In my view it is both unnecessary and incorrect to ask whether the state can show that the statute 'is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.'" In the present case, there is no disagreement that indecent and patently offensive speech have the full protection of the First Amendment.

[3] Not only has speech been divided up and given values—with some types of speech given little or no protection (obscenity, fighting words, possibly commercial speech)—but also, by court decisions over the years, it has been decided that the content of speech can indeed be regulated provided that the regulation will directly and materially advance a compelling

First Amendment jurisprudence has developed into a study of intertwining standards and applications, perhaps as a necessary response to our ever-evolving culture and modes of communication.[4]

Essentially, my concerns are these: above all, I believe that the challenged provisions are so vague as to violate both the First and Fifth Amendments, and in particular that Congress' reliance on *Pacifica* is misplaced. In addition, I believe that technology as it currently exists—and it bears repeating that we are

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government interest, and that it is narrowly tailored to accomplish that interest in the least restrictive manner. However, any content-based restriction must survive this most exacting scrutiny. *Sable*, 492 U.S. 115; *Texas v. Johnson*, 491 U.S. 397 (1989).

[4] The plaintiffs have made facial challenges to the disputed provisions of the CDA on grounds of both vagueness and overbreadth. The approach taken and language used in evaluating a statute under each of these doctrines commingles, and frequently is treated as a single approach. "We have traditionally viewed vagueness and overbreadth as logically related and similar doctrines." *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983) (citing *Keyishian v. Board of Regents*, 385 U.S. 589, 609 (1967); *NAACP v. Button*, 371 U.S. 415, 433 (1963)). Even in cases where the court attempts to distinguish these two doctrines, it acknowledges some interplay between them. *See e.g. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, and n. 6 (1982).

In addition, when discussing overbreadth, one cannot avoid reference to the same language used to describe and apply the strict scrutiny standard to constitutionally protected activities. *See e.g. Sable*, 492 U.S. at 131; *Roberts v. Jaycees*, 468 U.S. 609, 623 (1984). While there are occasional attempts to argue for clear distinctions among these doctrines, *see e.g. Kolender*, 461 U.S. at 369 (White, J., Rehnquist, J. dissenting), such bright lines simply have not been, and most likely cannot be, drawn in this area.

at the preliminary injunction phase only—cannot provide a safe harbor for most speakers on the Internet, thus rendering the statute unconstitutional under a strict scrutiny analysis. I refer to Chief Judge Sloviter's more detailed analysis of this issue.

While I believe that our findings of fact clearly show that as yet no defense is technologically feasible, and while I also have found the present Act to be unconstitutionally vague, I believe it is too early in the development of this new medium to conclude that other attempts to regulate protected speech within the medium will fail a challenge. That is to say that I specifically do not find that any and all statutory regulation of protected speech on the Internet could not survive constitutional scrutiny. Prior cases have established that government regulation to prevent access by minors to speech protected for adults, even in media considered the vanguard of our First Amendment protections, like print, may withstand a constitutional challenge. *See e.g. Ginsberg v. New York*, 390 U.S. 629, 635 (1968) (" 'Material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children.' ") (quoting *Bookcase Inc. v. Broderick*, 18 N.Y.2d 71, 75, 271 N.Y.S.2d 947, 952, 218 N.E.2d 668, 671 (1966), *appeal dismissed, sub nom Bookcase, Inc. v. Leary*, 385 U.S. 12 (1966)). It should be noted that those restrictions that have been found constitutional were sensitive to the unique qualities of the medium at which the restriction was aimed.

B.

This statute, all parties agree, deals with protected speech, the preservation of which has been extolled by court after court in case after case as the keystone,

the bulwark, the very heart of our democracy. What is more, the CDA attempts to regulate protected speech through criminal sanctions, thus implicating not only the First but also the Fifth Amendment of our Constitution. The concept of due process is every bit as important to our form of government as is free speech. If free speech is at the heart of our democracy, then surely due process is the very lifeblood of our body politic; for without it, democracy could not survive. Distilled to its essence, due process is, of course, nothing more and nothing less than fair play. If our citizens cannot rely on fair play in their relationship with their government, the stature of our government as a shining example of democracy would be greatly diminished. I believe that an exacting or strict scrutiny of a statute which attempts to criminalize protected speech requires a word by word look at that statute to be sure that it clearly sets forth as precisely as possible what constitutes a violation of the statute.

The reason for such an examination is obvious. If the Government is going to intrude upon the sacred ground of the First Amendment and tell its citizens that their exercise of protected speech could land them in jail, the law imposing such a penalty must clearly define the prohibited speech not only for the potential offender but also for the potential enforcer. *Kolender*, 461 U.S. 352; *Hoffman Estates*, 455 U.S. 489; *Smith v. Goguen*, 415 U.S. 566 (1974); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Winters v. New York*, 333 U.S. 507 (1948).

In dealing with issues of vagueness and due process over the years, the Supreme Court has enunciated many notable principles. One concern with vague

laws relates to the issue of notice. The older cases have used phrases such as "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law," *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926) (citations omitted); "it will not do to hold an average man to the peril of indictment for the unwise exercise of his . . . knowledge involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result," *Cline v. Frink Dairy Co.*, 274 U.S. 445, 465 (1927); and "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids," *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). Second, the Court has said that laws must provide precise standards for those who apply them to prevent arbitrary and discriminatory enforcement, because "[w]hen the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Kolender*, 461 U.S. at 358 (citing *Goguen*, 415 U.S. at 575). Finally, when First Amendment concerns have been implicated, a stricter standard of examination for vagueness is imperative. "[T]his court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Smith v. California*, 361 U.S. 147,

151 (1959). *See also Hoffman Estates*, 455 U.S. at 499 ("[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech . . ., a more stringent vagueness test should apply.") (citations omitted).

A case which sums up vagueness as it relates to due process as succinctly as any other is *Grayned v. City of Rockford*. Here the court said:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to " 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

Grayned, 408 U.S. at 108-109 (citations omitted).

At the same time, in considering the vagueness issue, as the Government correctly points out, "[C]ondemned to the use of words, we can never expect mathematical certainty from our language." *Grayned*, 408 U.S. at 110. *See also Hoffman Estates*, 455 U.S. 489; *Hynes v. Mayor & Council of Oradell*, 425 U.S. 610 (1976); *Goguen*, 415 U.S. 566. In addition, it will always be true that the fertile legal "imagination can conjure hypothetical cases in which the meaning of [disputed] terms will be in nice question." *American Communications Assn. v. Douds*, 339 U.S. 382, 412 (1950). Thus, as I considered the vagueness issue I have kept in mind the observation of Justice Holmes, denying a challenge to vagueness in *Nash v. United States*, 229 U.S. 373 (1913). To Justice Holmes, "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment . . ., he may incur the penalty of death." *Nash*, 229 U.S. at 377. Even more recently the court has stated that "due process does not require 'impossible standards' of clarity." *Kolender*, 461 U.S. at 361, (quoting *United States v. Petrillo*, 332 U.S. 1, 7-8 (1947)). It is with all of these principles in mind, as they interplay with the unique features of the Internet, that I have reached my conclusion.

The fundamental constitutional principle that concerns me is one of simple fairness, and that is absent in the CDA. The Government initially argues

that "indecent" in this statute is the same as "patently offensive." I do not agree that a facial reading of this statute supports that conclusion. The CDA does not define the term "indecent," and the FCC has not promulgated regulations defining indecency in the medium of cyberspace. If "indecent" and "patently offensive" were intended to have the same meaning, surely section (a) could have mirrored section (d)'s language.[5] Indecent in this statute is an undefined word which, standing alone, offers no guidelines whatsoever as to its parameters. Interestingly, another federal crime gives a definition to indecent entirely different from that proposed in the present case.[6] While not applicable here, this example shows the indeterminate nature of the word and the need for clear definition, particularly in a statute which infringes upon protected speech. Although the use of different terms in § 223(a) and (d) suggests that Congress intended that the terms have different meanings, the Conference Report indicates an intention to treat § 223(a) as containing the same language as

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[5] Comparing a different portion of each of these two provisions suggests that different terms are not to be read to mean the same thing. As written, section (a) pertains to telecommunications devices, and section (d) to interactive computer services. While we have not entirely resolved the tension between these definitions at this stage, it has been established that these terms are not synonymous, but are in fact intended to denote different technologies. This, together with the rule of statutory construction set forth in Chief Judge Sloviter's opinion, seems to suggest on the face of the statute that indecent and patently offensive also are not to be read as synonymous.

[6] 18 U.S.C. §1461 states, "The term 'indecent' as used in this section includes matter of a character tending to incite arson, murder or assassination."

§ 223(d). Conf. Rep. at 188-89 ("The conferees intend that the term indecency . . . has the same meaning as established in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) and [*Sable*] and "New section 223(d)(1) codifies the definition of indecency from [*Pacifica*] . . . . The precise contours of the definition of indecency have varied . . . . The essence of the phrase—patently offensive descriptions of sexual and excretory activities—has remained constant, however."). Therefore, I will acknowledge that the term indecency is "reasonably susceptible" to the definition offered in the Conference Report and might therefore adopt such a narrowing construction if it would thereby preserve the constitutionality of the statute. *See Virginia v. American Booksellers Association*, 484 U.S. 383, 397 (1988); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

Accepting these terms as synonymous, however, provides no greater help to a speaker attempting to comply with the CDA. Contrary to the Government's suggestion, *Pacifica* does not answer the question of whether the terms pass constitutional muster in the present case. In *Pacifica*, the Court did not consider a vagueness challenge to the term "indecent," but considered only whether the Government had the authority to regulate the particular broadcast at issue—George Carlin's Monologue entitled "Filthy Words." In finding in the affirmative, the Court emphasized that its narrow holding applied only to broadcasting, which is "uniquely accessible to children, even those too young to read." 438 U.S. at 749. Thus, while the Court sanctioned the FCC's time restrictions on a radio program that repeatedly used vulgar language, the Supreme Court did not hold that

use of the term "indecent" in a statute applied to other media, particularly a criminal statute, would be on safe constitutional ground.

The Supreme Court more recently had occasion to consider a statute banning "indecent" material in the dial-a-porn context in *Sable*, 492 U.S. 115, and found that a complete ban on such programming violated the First Amendment because it was not narrowly tailored to serve the purpose of limiting children's access to commercial pornographic telephone messages. Once again, the Court did not consider a challenge to the term "indecent" on vagueness grounds, and indeed has never directly ruled on this issue.

Several other courts have, however, upheld the use of the term in statutes regulating different media. For example, in *Information Providers' Coalition v. FCC*, 928 F.2d 866 (9th Cir. 1991), the Ninth Circuit Court of Appeals considered whether the term "indecent" in the 1989 Amendment to the Communications Act regulating access to telephone dial-a-porn services and the FCC's implementing regulations was void for vagueness. The FCC had defined "indecent" as "the description or depiction of sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the telephone medium." 928 F.2d at 874. Although recognizing that the Supreme Court had never explicitly ruled on a vagueness challenge to the term, the court read *Sable* and *Pacifica* as having implicitly accepted the use of this definition of "indecent." The court further stated that the FCC's definition of "indecent" was no less imprecise than was the definition of "obscenity" as announced in *Miller v. California*, 413 U.S. 15, 25 (1973), and thus concluded that

"indecent" as pertained to dial-a-porn regulations must survive a vagueness challenge. *See also Dial Information Services v. Thornburgh*, 938 F.2d 1535 (2d Cir.1991), (upholding the use of "indecent" in the same amendment to the Communications Act and FCC regulations.); *Action for Children's Television v. FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991) (rejecting vagueness challenge to "indecency" provision in broadcast television regulations).[7]

Notably, however, in these telephone and cable television cases the FCC had defined indecent as patently offensive by reference to contemporary community standards *for that particular medium*. *See, e.g., Pacifica*, 438 U.S. at 732 (defining "indecent" by reference to terms "patently offensive as measured by contemporary community standards for the broadcast medium"); *Dial Information Services*, 938 F.2d at 1540 (defining indecency by reference to contemporary community standards for the telephone medium). Here, the provision is not so limited. In fact, there is no effort to conform the restricting terms to the medium of cyberspace, as is required under *Pacifica* and its progeny.

The Government attempts to save the "indecency" and "patently offensive" provisions by claiming that the provisions would only be used to prosecute pornographic works which, when considered "in context"

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[7] Although the Supreme Court may rule on the vagueness question in the context of cable television regulation in *Alliance for Community Media v. FCC*, 56 F.3d 105 (D.C. Cir. 1995), currently pending on *certiorari* before the Court, we will not defer adjudication of this issue as the constitutionality of the term in the cable context may not be determinative of its use in cyberspace.

as the statute requires, would be considered "indecent" or "patently offensive" in any community. The Government thus contends that plaintiffs' fears of prosecution for publishing material about matters of health, art, literature or civil liberties are exaggerated and unjustified. The Government's argument raises two issues: first is the question of which "community standards" apply in cyberspace, under the CDA; and second is the proposition that citizens should simply rely upon prosecutors to apply the statute constitutionally.

Are the contemporary community standards to be applied those of the vast world of cyberspace, in accordance with the Act's apparent intent to establish a uniform national standard of content regulation? The Government offered no evidence of any such national standard or nationwide consensus as to what would be considered "patently offensive". On the contrary, in supporting the use of the term "indecent" in the CDA, the Government suggests that, in part, this term was chosen as a means of insulating children from material not restricted under current obscenity laws. This additional term is necessary, the Government states, because "whether something rises to the level of obscene is a legal conclusion that, by definition, may vary from community to community." Govt. Brief at 31. In support of its argument, the Government points to the Second Circuit's decision in *United States v. Various Articles of Obscene Merchandise, Schedule No. 2102*, 709 F.2d 132, 134, 137 (2d Cir. 1983), which upheld the district court's conclusion that "detailed portrayals of genitalia, sexual intercourse, fellatio, and masturbation" including the film "Deep Throat" and other pornographic films and magazines, are not obscene in light of the community standards prevailing in New York City." What this argument indicates is that as interpretations of obscenity ebb and flow throughout various communities, restrictions on indecent material are meant to cover a greater or lesser quantity of material not reached by each community's obscenity standard. It follows that to do this, what constitutes indecency must be as open to fluctuation as the obscenity standard and cannot be rigidly constructed as a single national standard if it is meant to function as the Government has suggested. As Justice Scalia stated, "[t]he more narrow the understanding of what is 'obscene,' . . . the more pornographic what is embraced within the residual category of 'indecency.'" *Sable*, 492 U.S. at 132 (Scalia, J. concurring). This understanding is consistent with the case law, in which the Supreme Court has explained that the relevant community is the one where the information is accessed and where the local jury sits. *See Sable*, 492 U.S. at 125; *Hamling v. United States*, 418 U.S. 87 (1974); *Miller*, 413 U.S. at 30 ("[O]ur nation is simply too big and too diverse for this Court to reasonably expect that such standards [of what is patently offensive] could be articulated for all 50 states in a single formulation."). However, the Conference Report with regard to the CDA states that the Act is "intended to establish a uniform national standard of content regulation." Conf. Rep. at 191. This conflict inevitably leaves the reader of the CDA unable to discern the relevant "community standard," and will undoubtedly cause Internet users to "steer far wider of the unlawful zone" than if the community standard to be applied were clearly defined. The chilling effect on the Internet users' exercise of free

speech is obvious. *See Baggett v. Bullitt*, 377 U.S. 360, 372 (1964). This is precisely the vice of vagueness.

In addition, the Government's argument that the challenged provisions will be applied only to "pornographic" materials, and will not be applied to works with serious value is without support in the CDA itself. Unlike in the obscenity context, indecency has *not* been defined to exclude works of serious literary, artistic, political or scientific value, and therefore the Government's suggestion that it will not be used to prosecute publishers of such material is without foundation in the law itself. The Government's claim that the work must be considered patently offensive "in context" does nothing to clarify the provision, for it fails to explain which context is relevant. "Context" may refer to, among other things, the nature of the communication as a whole, the time of day it was conveyed, the medium used, the identity of the speaker, or whether or not it is accompanied by appropriate warnings. *See e.g.*, *Pacifica*, 438 U.S. at 741 n.16, n.17 (referring to "the context of the whole book," and to the unique interpretation of the First Amendment "in the broadcasting context").

The thrust of the Government's argument is that the court should trust prosecutors to prosecute only a small segment of those speakers subject to the CDA's restrictions, and whose works would reasonably be considered "patently offensive" in *every* community. Such unfettered discretion to prosecutors, however, is precisely what due process does not allow. "It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful . . . prosecution for some of the activities

seemingly embraced within the sweeping statutory definitions. The hazard of being prosecuted . . . nevertheless remains . . . . Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law." *Baggett*, 377 U.S. at 373-74; *see also Keyishian v. Board of Regents*, 385 U.S. 589, 599 (1967) ("[i]t is no answer" to a vague law for the Government "to say that the statute would not be applied in such a case."). And we cannot overlook the vagaries of politics. What may be, figuratively speaking, one administration's pen may be another's sword.

The evidence and arguments presented by the Government illustrate the possibility of arbitrary enforcement of the Act. For example, one Government expert opined that any of the so-called "seven dirty words" used in the Carlin monologue would be subject to the CDA and therefore should be "tagged," as should paintings of nudes displayed on a museum's web site. The Government has suggested in its brief, however, that the Act should not be so applied. *See* Govt. Brief at 37 (suggesting that "seven dirty words" if used "in the context of serious discussions" would not be subject to the Act). Even Government counsel was unable to define "indecency" with specificity. The Justice Department attorney could not respond to numerous questions from the court regarding whether, for example, artistic photographs of a nude man with an erect penis, depictions of Indian statues portraying different methods of copulation, or the transcript of a scene from a contemporary play about AIDS could be considered "indecent" under the Act.

Plaintiffs also argue that section 223(e)(5)(A) of the CDA, offering a defense for speakers who take "good

faith, reasonable, effective and appropriate actions under the circumstances to restrict or prevent access by minors to a communication" covered by the Act, is unconstitutionally vague because it fails to specify what would constitute an effective defense to prosecution. The plain language of the safe harbor provision indicates an effort to ensure that the statute limits speech in the least restrictive means possible by taking into account emerging technologies in allowing for any and all "reasonable, effective and appropriate" approaches to restricting minors' access to the proscribed material. But, the statute itself does not contain any description of what, other than credit card verification and adult identification codes —which we have established remain unavailable to most content providers—will protect a speaker from prosecution. Significantly, although the FCC is authorized to specify measures that might satisfy this defense, the FCC's views will not be definitive but will only "be admitted as evidence of good faith efforts" that the defendant has met the requirements of the defense. 47 U.S.C. § 223(e)(6). Thus, individuals attempting to comply with the statute presently have no clear indication of what actions will ensure that they will be insulated from criminal sanctions under the CDA.

C.

The consequences of posting indecent content are severe.[8] I recognize that people must make judg-

[8] Each intentional act of posting indecent content for display shall be considered a separate violation of this subsection and carries with it a fine, a prison term of up to two years, or both. 47 U.S.C. § 223(a), (d) and Conf. Rep. at 189.

ments each and every day, many times in the most intimate of relationships and that an error in judgment can have serious consequences. It is also true that where those consequences involve penal sanctions, a criminal law or statute has more often than not carefully defined the proscribed conduct. It is not so much that the accused needs these precise definitions, as it has been said he or she rarely reads the law in advance. What is more important is that the enforcer of statutes must be guided by clear and precise standards. In statutes that break into relatively new areas, such as this one, the need for definition of terms is greater, because even commonly understood terms may have different connotations or parameters in this new context.[9] Words cannot define conduct with mathematical certainty, and lawyers, like the bright and intelligent ones now before us, will most certainly continue to devise ways by which to challenge them. This rationale, however, can neither support a finding of constitutionality nor relieve legislators from the very difficult task of carefully drafting legislation tailored to its goal and sensitive to the unique characteristics of, in this instance, cyberspace.

[9] As I have noted, the unique nature of the medium cannot be overemphasized in discussing and determining the vagueness issue. This is not to suggest that new technology should drive constitutional law. To the contrary, I remain of the belief that our fundamental constitutional principles can accommodate any technological achievements, even those which, *presently* seem to many to be in the nature of a miracle such as the Internet.

DALZELL, District Judge:

A. Introduction

I begin with first principles: As a general rule, the Constitution forbids the Government from silencing speakers because of their particular message. *R.A.V. v. City of Saint Paul*, 112 S. Ct. 2538, 2542 (1992). "Our political system and cultural life rest upon this ideal." *Turner Broadcasting Sys. v. FCC*, 114 S. Ct. 2445, 2458 (1994). This general rule is subject only to "narrow and well-understood exceptions". *Id.* A law that, as here, regulates speech on the basis of its content, is "presumptively invalid". *R.A.V.*, 112 S.Ct. at 2542.

Two of the exceptions to this general rule deal with obscenity (commonly understood to include so-called hardcore pornography), *Miller v. California*, 413 U.S. 15 (1973), and child pornography, *New York v. Ferber*, 458 U.S. 747 (1982). The Government can and does punish with criminal sanction people who engage in these forms of speech. 18 U.S.C. §§ 1464-65 (criminalizing obscene material); *id.* §§ 2251-52 (criminalizing child pornography). Indeed, the Government could punish these forms of speech on the Internet even without the CDA. *E.g.*, *United States v. Thomas*, 74 F.3d 701, 704-05 (6th Cir. 1995) (affirming obscenity convictions for the operation of a computer bulletin board).

The Government could also completely ban obscenity and child pornography from the Internet. No Internet speaker has a right to engage in these forms of speech, and no Internet listener has a right to receive them. Child pornography and obscenity have "no constitutional protection, and the government

may ban [them] outright in certain media, or in all." *Alliance for Community Media v. FCC*, 56 F.3d 105, 112 (D.C. Cir. 1995) (citing *R.A.V.*, 112 S. Ct. at 2545), *cert. granted sub nom. Denver Area Educ. Telecommunications Consortium v. FCC*, 116 S. Ct. 471 (1996); *see also Ferber*, 458 U.S. at 756. As *R.A.V.* notes, "'the freedom of speech' referred to by the First Amendment does not include a freedom to disregard these traditional limitations." *R.A.V.*, 112 S. Ct. at 2543.

The cases before us, however, are *not* about obscenity or child pornography. Plaintiffs in these actions claim no right to engage in these forms of speech in the future, nor does the Government intimate that plaintiffs have engaged in these forms of speech in the past.

This case is about "indecency", as that word has come to be understood since the Supreme Court's decisions in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), and *Sable Communications v. FCC*, 492 U.S. 115 (1989). The legal difficulties in these actions arise because of the special place that indecency occupies in the Supreme Court's First Amendment jurisprudence. While adults have a First Amendment right to engage in indecent speech, *Sable*, 492 U.S. at 126; *see also Pacifica*, 438 U.S. at 747-48, the Supreme Court has also held that the Government may, consistent with the Constitution, regulate indecency on radio and television, and in the "dial-a-porn" context, as long as the regulation does not operate as a complete ban. Thus, any regulation of indecency in these areas must give adults access to indecent speech, which is their right.

The Government may only regulate indecent speech for a compelling reason, and in the least restrictive manner. *Sable*, 492 U.S. at 126. "It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Id.* This "most exacting scrutiny", *Turner*, 114 S. Ct. at 2459, requires the Government to "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1017 (1995) (citing *Turner*, 114 S. Ct. at 1017). Thus, although our analysis here must balance ends and means, the scales tip at the outset in plaintiffs' favor. This is so because "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 116 (1991) (citation omitted).

The Government argues that this case is really about pornography on the Internet. Apart from hardcore and child pornography, however, the word *pornography* does not have a fixed legal meaning. When I use the word *pornography* in my analysis below, I refer to for-profit purveyors of sexually explicit, "adult" material similar to that at issue in *Sable*. *See* 492 U.S. at 118. Pornography is normally either obscene or indecent, as Justice Scalia noted in his concurrence in *Sable*. *Id.* at 132. I would avoid using such an imprecise (and overbroad) word, but I feel compelled to do so here, since Congress undoubtedly had such material in mind when it passed the

CDA. *See* S. Rep. No. 230, 104th Cong., 2d Sess. 187-91 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 200-05 [hereinafter *Senate Report*]. Moreover, the Government has defended the Act before this court by arguing that the Act could be constitutionally applied to such material.

Plaintiffs have, as noted, moved for a preliminary injunction. The standards for such relief are well-settled. Plaintiffs seeking preliminary injunctive relief must show (1) "[a] reasonable probability of eventual success in the litigation" and (2) "irreparabl[e] injur[y] *pendente lite*" if relief is not granted. *Acierno v. New Castle County*, 40 F.3d 645, 653 (3d Cir. 1994). We must also consider, if appropriate, (3) "the possibility of harm to other interested persons from the grant or denial of the injunction", and (4) "the public interest". *Id.*; *see also Opticians Ass'n v. Independent Opticians*, 920 F.2d 187, 192 (3d Cir. 1990).

In a First Amendment challenge, a plaintiff who meets the first prong of the test for a preliminary injunction will almost certainly meet the second, since irreparable injury normally arises out of the deprivation of speech rights, "for even minimal periods of time". *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976); *Hohe v. Casey*, 868 F.2d 69, 72 (3d Cir.), *cert. denied*, 493 U.S. 848 (1989). Of course, neither the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law. Thus, I focus my legal analysis today primarily on whether plaintiffs have shown a likelihood of success on their claim that the CDA is unconstitutional. The issues of irreparable harm to plaintiffs, harm to

third parties, and the public interest all flow from that determination.[1]

Plaintiffs' challenge here is a "facial" one. A law that regulates the content of speech is facially invalid if it does not pass the "most exacting scrutiny" that we have described above, or if it would "penalize a substantial amount of speech that is constitutionally protected". *Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395, 2401 (1992). This is so even if some applications would be "constitutionally unobjectionable". *Id.*; *see also National Treasury Employees Union v. United States*, 990 F.2d 1271, 1279-80 (D.C. Cir.1993) (Randolph, J., concurring), *aff'd*, 115 S. Ct. 1003 (1995). Sometimes facial challenges require an inquiry into a party's "standing" (*i.e.*, whether a party may properly challenge a law as facially invalid). *See, e.g., Ferber*, 458 U.S. at 767-79. At other times a facial challenge requires only an inquiry into the law's reach. *See, e.g., R.A.V.*, 112 S. Ct. at 2547.[2]

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[1] By Order dated March 13, 1996, we asked the parties to submit their views on questions regarding allocation of the burdens of proof in these cases. Since I believe that the outcome of these cases is clear regardless of the allocation of proof between the parties, none of my conclusions in this opinion requires me to choose between the arguments that the parties have presented to us.

[2] Although I do not believe the statute is unconstitutionally vague, I agree with Judge Buckwalter that the Government's promise not to enforce the plain reach of the law cannot salvage its overbreadth. Even accepting the Government's argument that prosecution of non-obscene pornography would be a "legitimate application" of the CDA, *City of Houston v. Hill*, 482 U.S. 451, 459 (1987), it is clear that the Act would "make unlawful a substantial amount of constitutionally protected conduct", *id.* As in *Hill*, the Government's circular reasoning—that the law is constitutional because prosecutors would only apply it to those against whom it could constitutionally be applied—must fail. *See id.* at 464-67.

As I describe it in part C below, I have no question that plaintiffs here have standing to challenge the validity of the CDA, and, indeed, the Government has not seriously challenged plaintiffs' standing to do so. *See, e.g., Virginia v. American Booksellers Assoc.*, 484 U.S. 383, 392 (1988). Thus, the focus is squarely on the merits of plaintiffs' facial challenge.[3]

I divide my legal analysis below into three parts. In Part B, I examine the traditional definition of indecency and relate it to the provisions of the CDA at issue in this action. From this analysis I conclude that § 223(a) and § 223(d) of the CDA reach the same kind of speech. My analysis also convinces me that plaintiffs are unlikely to succeed in their claim that the CDA is unconstitutionally vague. In Part C, I address the Government's argument that plaintiffs are not the CDA's target, nor would they likely face

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[3] Plaintiffs have argued that we may consider their challenge under the standards governing both "facial" and "as-applied" challenges. That is, they suggest that we may pass judgment on the decency of the plaintiffs' speech, even if we are unable to conclude that the act is facially unconstitutional. Surely this procedural confusion arises out of the three opinions of the D.C. Circuit in *National Treasury Employees Union v. United States*, 990 F.2d 1271, 1279-80 (D.C. Cir. 1993), *aff'd*, 115 S. Ct. 1003.

I doubt that we could undertake an as-applied inquiry, since we do not know the exact content ot plaintiffs' speech. Indeed, it is impossible to know the exact content of some plaintiffs' speech since plaintiffs themselves cannot know that content. America Online, for example, cannot know what its subscribers will spontaneously say in chat rooms or post to bulletin boards. In any event, I need not address this issue, in the light of our disposition today.

prosecution under the Act. Here, I conclude that plaintiffs could reasonably fear prosecution under the Act, even if some of their fears border on the far-fetched. In Part D, I consider the legal implications of the special attributes of Internet communication, as well as the effect that the CDA would have on these attributes. In this Part I conclude that the disruptive effect of the CDA on Internet communication, as well as the CDA's broad reach into protected speech, not only render the Act unconstitutional but also would render unconstitutional any regulation of protected speech on this new medium.

B. Defining Indecency

Although no court of appeals has ever to my knowledge upheld a vagueness challenge to the meaning of "indecency", several recent cases have grappled with the elusive meaning of that word in the context of cable television and "dial-a-porn". *Alliance for Community Media v. FCC*, 56 F.3d 105 (D.C. Cir. 1995), *cert. granted*, 116 S. Ct. 471 (1996); *Dial Information Serv. Corp. v. Thornburgh*, 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 502 U.S. 1072 (1992); *Information Providers' Coalition for Defense of the First Amendment v. FCC*, 928 F.2d 866 (9th Cir. 1991).

In *Alliance for Community Media*, 56 F.3d at 123-25, for example, the District of Columbia Court of Appeals addressed prohibitions on indecent programming on certain cable television channels. That court noted that the FCC has codified the meaning of "'indecent' programming" on cable television as "programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium." *Id.* at 112 (citing what is now 47 C.F.R. § 76.701(g)).

The FCC took a similar approach to the definition of "indecency" in the "dial- a-porn" medium.[4] In *Dial Information Services*, 938 F.2d at 1540, the Second Circuit quoted the FCC's definition of indecent telephone communications in that context:

> [I]n the dial-a-porn context, we believe it is appropriate to define indecency as the description or depiction of sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the telephone medium.

Id. at 1540 (citation omitted); *see also Information Providers' Coalition for Defense of the First Amendment v. FCC*, 928 F.2d 866, 876 (9th Cir. 1991).

These three cases recognize that the FCC did not define "indecency" for cable and dial-a-porn in a vacuum. Rather, it borrowed from the Supreme Court's decision in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). In that case (which I describe in greater detail below), the Supreme Court established the rough outline from which the FCC fashioned its three-part definition. For the first two parts of the test, the Supreme Court emphasized the "importance of context" in examining arguably indecent material. *Id.* at 747 n.25. "Context" in the *Pacifica* opinion includes consideration of both the particular *medium* from which the material originates and the particular *community* that receives the material. *Id.* at 746 (as-

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[4] "Dial-a-porn" is a shorthand description of "sexually oriented prerecorded telephone messages". *Sable*, 492 U.S. at 117-18.

suming that the Carlin monologue "would be protected in other contexts"); *id.* at 748-51 (discussing the attributes of broadcast); *see also Information Providers' Coalition*, 928 F.2d at 876 (discussing the "content/context dichotomy"). Second, the opinion limits its discussion to "patently offensive sexual and excretory language", *Pacifica*, 438 U.S. at 747, and this type of content has remained the FCC's touchstone. *See, e.g., Alliance for Community Media*, 56 F.3d at 112.[5]

We have quoted from the CDA extensively above and I will only briefly rehearse that discussion here. Section 223(a) of the CDA criminalizes "indecent" speech on the Internet. This is the "indecency" provision. Section 223(d) of the CDA addresses speech that, "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs". This is the "patently offensive" provision. The foregoing discussion leads me to conclude that these two provisions describe the same kind of speech. That is, the use of "indecent" in § 223(a) is shorthand for the longer description in § 223(d). Conversely, the longer description in § 223(d) is itself the definition of "indecent" speech. I believe Congress could have used the word "indecent" in both § 223(a) and § 223(d), or it could have used the "patently offensive" description of § 223(d) in § 223(a), without a change in the meaning of the Act. I do not believe that Congress

[5] In turn, *Pacifica*'s definition of indecency has its roots in the Supreme Court's obscenity jurisprudence. Indecency includes some but not all of the elements of obscenity. *See, e.g., Alliance for Community Media*, 56 F.3d at 113-14 n.4.

intended that this distinction alone would change the reach of either section of the CDA.[6]

The CDA's legislative history confirms this conclusion. There, the conference committee explicitly noted that § 223(d) "codifies the definition of indecency from *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). . . . The conferees intend that the term indecency (and the rendition of the definition of that term in new section 502) has the same meaning as established in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) and *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989)." *Senate Report* at 188, *reprinted in* 1996 U.S.C.C.A.N. at 201-02. The legislative history makes clear that Congress did not intend to create a distinction in meaning when it used the generic term "indecency" in § 223(a) and the definition of that term in § 223(d).[7]

There is no doubt that the CDA requires the most stringent review for vagueness, since it is a criminal statute that "threatens to inhibit the exercise of

[6] The reach of the two provisions is not coterminous, however. As we explain in the introduction to this Adjudication, § 223(a) reaches the making, creation, transmission, and initiation of indecent speech. Section 223(d) arguably reaches more broadly to the "display" of indecent speech. I conclude here only that both sections refer to the identical type of proscribed speech.

[7] At oral argument, counsel for the Government candidly recognized that "there's nothing quite like this statute before", and that the CDA's novelty raised some "legislative craftsmanship problem[s]". Transcript of May 10, 1996, at 81-82. I believe that my analysis here makes sense in the light of the legislative history and the jurisprudence on which Congress relied in enacting the CDA. *See* Senate Report at 188, *reprinted in* 1996 U.S.C.C.A.N. at 201-02.

constitutionally protected rights". *Colautti v. Franklin*, 439 U.S. 379, 391 (1979); *see also Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983); *Grayned*, 408 U.S. at 108-09. My analysis here nevertheless leads ineluctably to the conclusion that the definition of indecency is not unconstitutionally vague. The *Miller* definition of obscenity has survived such challenges, *see, e.g., Hamling v. United States*, 418 U.S. 87, 118-19 (1974); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 57 (1989), and the definition of indecency contains a subset of the elements of obscenity. If the *Miller* test "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly", *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), the omission of parts of that test does not warrant a contrary conclusion. *See Dial Information Services*, 938 F.2d at 1541-42. Similarly, since the definition of indecency arose from the Supreme Court itself in *Pacifica*, we may fairly imply that the Court did not believe its own interpretation to invite "arbitrary and discriminatory enforcement" or "abut upon sensitive areas of basic First Amendment freedoms". *Grayned*, 408 U.S. at 108-109 (citations and alterations omitted). *Sable*, while not explicitly addressing the issue of vagueness, reinforces this conclusion. *See Information Providers' Coalition*, 928 F.2d at 875-76 (citing *Sable*, 492 U.S. at 126-27). It follows, then, that plaintiffs' vagueness challenge is not likely to succeed on the merits and does not support preliminary injunctive relief.

The possible interpretations of the defenses in § 223(e) do not alter this conclusion. As a matter of statutory construction, § 223(e)(5)(B) could not be

clearer. This section, which imports the dial-a-porn defenses into the CDA, creates "specific and objective" methods to avoid liability. *See Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984). Section 223(e)(5)(A) is more suspect, since it arguably "fail[s] to describe with sufficient particularity what a suspect must do in order to satisfy" it. *Kolender*, 461 U.S. at 361.[8] Yet even though the defenses in both sections are unavailable to many Internet users, their unavailability does not render the *liability* provisions vague. Rather, their unavailability just transforms § 223(a) and § 223(d) into a total ban, in violation of *Butler v. Michigan*, 352 U.S. 380, 383 (1957), and *Sable*, 492 U.S. at 127, 131. I am sensitive to plaintiffs' arguments that the statute, as written, does not create safe harbors through which all Internet users may shield themselves from liability. Transcript of May 10, 1996, at 37-38. Here again, however, the absence of safe harbors relates to the (over)breadth of a statute, and not its vagueness. *See Sable*, 492 U.S. at 127, 131.

C. Plaintiffs' Likelihood of Prosecution Under the Act

The Government has consistently argued that the speech of many of the plaintiffs here is almost certainly not indecent. They point, for example, to the educational and political content of plaintiffs' speech,

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[8] The counterargument is that § 223(e)(5)(A), when read together with § 223(e)(6), merely confers jurisdiction on the FCC to prescribe the "reasonable, effective, and appropriate actions" that count as defenses. Congress employed a similar scheme for dial-a-porn. *See Dial Information Servs.*, 938 F.2d at 1539 (citing 47 U.S.C. § 223(b)(3)); *Information Providers' Coalition*, 928 F.2d at 871.

and they also suggest that the occasional curse word in a card catalogue will probably not result in prosecution. *See Senate Report* at 189, *reprinted in* 1996 U.S.C.C.A.N. at 203 ("Material with serious redeeming value is quite obviously intended to edify and educate, not to offend."). In this section I address that argument.

I agree with the Government that some of plaintiffs' claims are somewhat exaggerated, but hyperbolic claims do not in themselves weigh in the Government's favor. In recent First Amendment challenges, the Supreme Court has itself paid close attention to extreme applications of content-based laws.

In *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991), the Court addressed the constitutionality of a law that required criminals to turn over to their victims any income derived from books, movies, or other commercial exploitation of their crimes. *Id.* at 504-05. In its opinion, the Court evaluated the argument of an *amicus curiae* that the law's reach could include books such as *The Autobiography of Malcolm X*, *Civil Disobedience*, and *Confessions of Saint Augustine*, and authors such as Emma Goldman, Martin Luther King, Jr., Sir Walter Raleigh, Jesse Jackson, and Bertrand Russell. *Id.* at 121-22. The Court credited the argument even while recognizing that it was laced with "hyperbole":

> The argument that [the] statute . . . would prevent publication of all of these works is hyperbole—some would have been written without compensation—but the . . . law clearly reaches a wide range of literature that does not enable a criminal to profit from his crime while a victim remains uncompensated.

Id. at 122. If a content-based law "*can* produce such an outcome", *id.* at 123 (emphasis added), then *Simon & Schuster* allows us to consider those outcomes in our analysis.

Even more recently, in *United States v. National Treasury Employees Union*, 115 S. Ct. 1003 (1995), the Court addressed the constitutionality of a law that banned federal employees from accepting honoraria for publications unrelated to their work. *Id.* at 1008. The Court noted that the law would reach "literary giants like Nathaniel Hawthorne and Herman Melville, . . . Walt Whitman, . . . and Bret Harte". *Id.* at 1012. This concern resurfaced later in the opinion, *see id.* at 1015 ("[W]e cannot ignore the risk that [the ban] might deprive us of the work of a future Melville or Hawthorne."), even though a footnote immediately renders this concern at least hyperbolic:

> These authors' familiar masterworks would survive the honoraria ban as currently administered. Besides exempting all books, the [regulations implementing the ban] protect fiction and poetry from the ban's coverage, although the statute's language is not so clear. But some great artists deal in fact as well as fiction, and some deal in both.

Id. n.16 (citations omitted).

Here, even though it is perhaps unlikely that the Carnegie Library will ever stand in the dock for putting its card catalogue online, or that the Government will hale the ACLU into court for its online quiz of the seven dirty words, we cannot ignore that

the Act could reach these activities. The definition of indecency, like the definition of obscenity, is not a rigid formula. Rather, it confers a large degree of autonomy to individual communities to set the bounds for decency for themselves. *Cf. Sable*, 492 U.S. at 125-26. This is as it should be, since this flexibility recognizes that ours is a country with diverse cultural and historical roots. *See, e.g., Hamling*, 418 U.S. at 104 ("A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law.").

Putting aside hyperbolic application, I also have little doubt that some communities could well consider plaintiffs' speech indecent, and these plaintiffs could—perhaps should—have a legitimate fear of prosecution. In *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995), the District of Columbia Court of Appeals summarized three broadcasts that the FCC found indecent in the late 1980s:

> The offending morning broadcast . . . contained "explicit references to masturbation, ejaculation, breast size, penis size, sexual intercourse, nudity, urination, oral-genital contact, erections, sodomy, bestiality, menstruation and testicles." The remaining two were similarly objectionable.

Id. at 657 (citing *In re Infinity Broadcasting Corp.*, 3 FCC R. 930, 932 (1987)). In *Infinity Broadcasting*, one of the broadcasts that the FCC found indecent was an excerpt of a play about AIDS, finding that the excerpts "contained the concentrated and repeated use of vulgar and shocking language to portray

graphic and lewd depictions of excretion, anal intercourse, ejaculation, masturbation, and oral-genital sex". 3 FCC R. at 934.[9] To the FCC, even broadcasts with "public value . . . addressing the serious problems posed by AIDS" can be indecent if "that material is presented in a *manner* that is patently offensive". *Id.* (emphasis in original).[10]

Yet, this is precisely the kind of speech that occurs, for example, on Critical Path AIDS Project's Web site, which includes safer sex instructions written in street language for easy comprehension. The Web site also describes the risk of HIV transmission for particular sexual practices. The FCC's implication in *In the Matter of King Broadcasting Co.*, 5 FCC R. 2971 (1990), that a "candid discussion[] of sexual topics" on television was decent in part because it was "not presented in a pandering, titillating or vulgar manner" would be unavailing to Critical Path, other plaintiffs, and some *amici*. These organizations want to pander and titillate on their Web sites, at least to a degree, to attract a teen audience and deliver their message in an engaging and coherent way.[11]

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[9] The play was "critically acclaimed and long-running in Los Angeles area theaters". *Infinity Broadcasting*, 3 FCC R. at 932.

[10] Analytically, it makes sense that indecent speech has public value. After all, indecent speech is nevertheless *protected* speech, *see, e.g., Sable*, 492 U.S. at 126, and it must therefore have some public value that underlies the need for protection. Obscenity, by contrast, has no public value, *id.* at 124, and thus has no protection from proscription.

[11] Internet technology undercuts the Government's argument that the "in context" element of §§ 223(a) and 223(d) would insulate plaintiffs such as Critical Path from liability. *See, e.g.*, Transcript of May 10, 1996, at 89-91. A user who

In *In re letter to Merrell Hansen*, 6 FCC R. 3689 (1990), the FCC found indecent a morning discussion between two announcers regarding Jim Bakker's alleged rape of Jessica Hahn. *Id.* Here, too, the FCC recognized that the broadcast had public value. *Id.* (noting that the broadcast concerned "an incident that was at the time 'in the news'"). Yet, under the FCC's interpretation of *Pacifica*, "the merit of a work is 'simply one of the many variables' that make up a work's context". *Id.* (citation omitted).

One of the plaintiffs here, Stop Prisoner Rape, Inc., has as its core purpose the issue of prison rape. The organization creates chat rooms in which members can discuss their experiences. Some *amici* have also organized Web sites dedicated to survivors of rape, incest, and other sexual abuse. These Web sites provide fora for the discussion and contemplation of shared experiences. The operators of these sites, and their participants, could legitimately fear prosecution under the CDA.

With respect to vulgarity, the Government is in a similarly weak position. In *Pacifica*, the Supreme Court held that multiple repetition of expletives could be indecent. *Pacifica*, 438 U.S. at 750. Although the FCC did not follow this rationale with respect to a broadcast of "a *bona fide* news story" on National Public Radio, *Letter to Mr. Peter Branton*, 6 FCC R. 610 (1991), *aff'd on other grounds sub nom. Branton v. FCC*, 993 F.2d 906, 908 (D.C. Cir. 1993), the ACLU,

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clicks on a link in the Critical Path database (*see* Findings 33, 77-78) might travel to a highly graphic page in a larger HTML document. The social value of that page, in context, might be debatable, but the use of links effectively excerpts that document by eliminating content unrelated to the link.

a plaintiff here, could take little comfort from that administrative decision. It would need to discern, for example, whether a chat room that it organized to discuss the meaning of the word *fuck* was more like the Carlin monologue or more like a National Public Radio broadcast.[12] Plaintiffs' expert would have found expletives indecent in a community consisting only of himself,[13] and his views undoubtedly—and reasonably—reflect the view of many people.

In sum, I am less confident than the Government that societal mores have changed so drastically since *Pacifica* that an online equivalent of the Carlin monologue, or the Carlin monologue itself online, would pass muster under the CDA. Under existing precedent, plaintiffs' fear of prosecution under the Act is legitimate, even though they are not the pornographers Congress had in mind when it passed the CDA.[14] *Cf. City of Houston v. Hill*, 482 U.S. 451,

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[12] Moreover, because of the technology of Internet relay chat, it would need to make this determination *before* it organized the chat room, since it could not pre-screen the discussion among the participants. Thus, it would need to predict, in advance, what the participants were likely to say. The participants would need to make a similar determination, unaided (I expect) by First Amendment lawyers.

[13] Testimony of April 12, 1996, at 235-36.

[14] In this section I do not imply that the FCC has jurisdiction to process Internet complaints in the same manner as it does for broadcast. The extent of the FCC's jurisdiction under the CDA is a sticky question not relevant here. *See Senate Report* at 190-91, *reprinted in* 1996 U.S.C.C.A.N. at 204. Because the administrative decisions cited above arose out of citizens' complaints to the FCC, however, they provide a kind of surrogate insight into the kinds of speech that citizens have charged as indecent in the past.

459 (1987). My discussion of the effect and reach of the CDA, therefore, applies both to plaintiffs' hyperbolic concerns and to their very real ones.

D. A Medium-Specific Analysis

The Internet is a new medium of mass communication.[15] As such, the Supreme Court's First Amendment jurisprudence compels us to consider the special qualities of this new medium in determining whether the CDA is a constitutional exercise of governmental power. Relying on these special qualities, which we have described at length in our Findings of fact above, I conclude that the CDA is unconstitutional and that the First Amendment denies Congress the power to regulate protected speech on the Internet. This analysis and conclusions are consistent with Congress's intent to avoid tortuous and piecemeal review of the CDA by authorizing expedited, direct review in the Supreme Court "as a matter of right" of interlocutory, and not merely final, orders upholding facial challenges to the Act. *See* § 561(b) of the Telecommunications Act of 1996.[16]

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[15] *See* Finding of fact 81. *See also* Symposium, *Emerging Media: Technology and the First Amendment*, 104 Yale L.J. 1613 (1995).

[16] A narrow holding for this new medium also will not eliminate the chill to plaintiffs, who could well stifle the extent of their participation in this new medium while awaiting a future iteration of the CDA. Such a holding would also lead Congress to believe that a rewritten CDA (using, for example, a "harmful to minors" standard, *see* Senate Report at 189, *reprinted in* 1996 U.S.C.C.A.N. at 202) would pass constitutional muster. In my view, a holding consistent with the novel qualities of this medium provides Congress with prompt and clear answers to the questions that the CDA asks.

1. The Differential Treatment of Mass Communication Media

Nearly fifty years ago, Justice Jackson recognized that "[t]he moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each . . . is a law unto itself". *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring). The Supreme Court has expressed this sentiment time and again since that date, and differential treatment of the mass media has become established First Amendment doctrine. *See, e.g., Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2456 (1994) ("It is true that our cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media."); *Pacifica*, 438 U.S. at 748 ("We have long recognized that each medium of expression presents special First Amendment problems."); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1974) ("Different communications media are treated differently for First Amendment purposes.") (Blackmun, J., concurring); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 500-01 (1981) (plurality opinion) ("This Court has often faced the problem of applying the broad principles of the First Amendment to unique forums of expression."). Thus, the Supreme Court has established different rules for print, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), broadcast radio and television, *see, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), cable television, *Turner*, 114 S. Ct. at 2456-57, and even billboards, *Metromedia*, 453 U.S. at 501, and

drive-in movie theaters, *Erzoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

This medium-specific approach to mass communication examines the underlying technology of the communication to find the proper fit between First Amendment values and competing interests. In print media, for example, the proper fit generally forbids governmental regulation of content, however minimal. *Tornillo*, 418 U.S. at 258. In other media (billboards, for example), the proper fit may allow for some regulation of both content and of the underlying technology (such as it is) of the communication. *Metromedia*, 453 U.S. at 502.

Radio and television broadcasting present the most expansive approach to medium-specific regulation of mass communication. As a result of the scarcity of band widths on the electromagnetic spectrum, the Government holds broad authority both to parcel out the frequencies and to prohibit others from speaking on the same frequency:

> As a general matter, there are more would-be broadcasters than frequencies available in the electromagnetic spectrum. And if two broadcasters were to attempt to transmit over the same frequency in the same locale, they would interfere with one another's signals, so that neither could be heard at all. The scarcity of broadcast frequencies thus required the establishment of some regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to particular broadcasters.

Turner, 114 S. Ct. at 2456 (citing *FCC v. League of Women Voters*, 468 U.S. 364 (1984)).

This scarcity also allows the Government to regulate content even after it assigns a license:

> In addition, the inherent physical limitation on the number of speakers who may use the broadcast medium has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees.

Id. at 2457 (citing *Red Lion*, 395 U.S. at 390-95; *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943)).

The broadcasting cases firmly establish that the Government may force a licensee to offer content to the public that the licensee would otherwise not offer, thereby assuring that radio and television audiences have a diversity of content. In broadcasting, "[i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial". *Red Lion*, 395 U.S. at 390; *see also CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981) ("A licensed broadcaster is 'granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.'") (citation omitted); *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 110-11 (1973). These content restrictions include punishing licensees who broadcast inappropriate but protected speech at an impermissible time. *Pacifica*, 438 U.S. at 750-51.

In this case, the Government relies on the *Pacifica* decision in arguing that the CDA is a constitutional

exercise of governmental power. Since the CDA regulates indecent speech, and since *Pacifica* authorizes governmental regulation of indecent speech (so the Government's argument goes), it must follow that the CDA is a valid exercise of governmental power. That argument, however, ignores *Pacifica*'s roots as a decision addressing the proper fit between broadcasting and the First Amendment. The argument also assumes that what is good for broadcasting is good for the Internet.

2. The Scope of the Pacifica Decision

In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Supreme Court first decided whether the Government had the power to regulate indecent speech. *Id.* at 729. In *Pacifica*, a radio listener complained about the broadcast of George Carlin's "Filthy Words" monologue at 2:00 p.m. on a Tuesday afternoon. *Id.* at 729-30. The Carlin monologue was replete with "the words you couldn't say on the public . . . airwaves . . ., ever", and the listener had tuned in while driving with his young son in New York. *Id.* The FCC issued a declaratory order, holding that it could have subjected the Pacifica Foundation (owner of the radio station) to an administrative sanction. *Id.* at 730. In its order the FCC also described the standards that it would use in the future to regulate indecency in the broadcast medium. *Id.* at 731. The Supreme Court upheld the FCC's decision and confirmed the power of that agency to regulate indecent speech. *Id.* at 750-51.

The rationale of *Pacifica* rested on three overlapping considerations. First, using as its example the Carlin monologue before it, the Court weighed the value of indecent speech and concluded that such

speech "lie[s] at the periphery of First Amendment concerns." *Id.* at 743. Although the Court recognized that the FCC had threatened to punish Pacifica based on the content of the Carlin monologue, *id.* at 742, it found that the punishment would have been permissible because four-letter words "offend for the same reasons that obscenity offends." *Id.* at 746 (footnote omitted). The Court then described the place of four-letter words "in the hierarchy of first amendment values":

> Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Id. at 746 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, (1942)).

Second, the Court recognized that "broadcasting . . . has received the most limited First Amendment protection." *Id.* at 748. The Government may regulate broadcast consistent with the Constitution, even though the same regulation would run afoul of the First Amendment in the print medium. *Id.* (comparing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) with *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974)). This is so because broadcasting has a "uniquely pervasive presence in the lives of all Americans" and "is uniquely accessible to children, even those too young to read." *Pacifica*, 438 U.S. at 748-49.

Third, the Court found the FCC's sanction—an administrative sanction—to be an appropriate means of regulating indecent speech. At the outset of the

opinion, the Court disclaimed that its holding was a "consider[ation of] any question relating to the possible application of § 1464 as a criminal statute." *Id.* at 739 n.13. Later in the opinion, the Court "emphasize[d] the narrowness of [its] holding", and explicitly recognized that it had not held that the Carlin monologue would justify a criminal prosecution. *Id.* at 750. Instead, the Court allowed the FCC to regulate indecent speech with administrative penalties under a "nuisance" rationale—"like a pig in the parlor instead of the barnyard." *Id.* at 750 (citation omitted).

Time has not been kind to the *Pacifica* decision. Later cases have eroded its reach, and the Supreme Court has repeatedly instructed against overreading the rationale of its holding.

First, in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, (1983), the Supreme Court refused to extend *Pacifica* to a law unrelated to broadcasting. In that case, a federal law prohibited the unsolicited mailing of contraceptive advertisements. *Id.* at 61. The Government defended the law by claiming an interest in protecting children from the advertisements. The Court rejected this argument as overbroad:

> In [*Pacifica*], this Court did recognize that the Government's interest in protecting the young justified special treatment of an afternoon broadcast heard by adults as well as children. At the same time, the majority "emphasize[d] the narrowness of our holding", explaining that broadcasting is "*uniquely* pervasive" and that it is "*uniquely* accessible to children, even those too young to read." The receipt of mail is far less intrusive and

> uncontrollable. Our decisions have recognized that the special interest of the Federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication.

Id. at 74 (citations and footnotes omitted) (emphasis in original) *see also id.* at 72 ("[T]he 'short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned.'") (citation omitted) (alterations in original).

Second, in *Sable Communications v. FCC*, 492 U.S. 115 (1989), the Supreme Court again limited *Pacifica*. In that case, the Court considered the validity of a ban on indecent "dial-a-porn" communications. *Id.* at 117-18.[17] As in *Bolger*, the Government argued that *Pacifica* justified a complete ban of that form of speech. The Supreme Court disagreed, holding instead that *Pacifica*'s "emphatically narrow" holding arose out of the "unique attributes of broadcasting". *Id.* at 127. The Court held that the ban was unconstitutional. *Id.* at 131.

Sable narrowed *Pacifica* in two ways. First, the Court implicitly rejected *Pacifica*'s nuisance rationale for dial-a-porn, holding instead that the Government could only regulate the medium "by narrowly drawn regulations designed to serve those interests

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[17] The history of dial-a-porn regulation both before and after *Sable* is tortuous, and involves the intervention of all three branches of government. I will not rehearse that history here, deferring instead to the other courts that have recounted it. *See, e.g., Sable*, 492 U.S. at 118-23; *Dial Information Serv.*, 938 F.2d at 1537-40; *Information Providers Coalition*, 928 F.2d at 870-73.

without unnecessarily interfering with First Amendment freedoms". *Id.* at 126 (citation omitted). Under this strict scrutiny, "[i]t is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Id.*; *see also Fabulous Assoc. v. Pennsylvania Pub. Util. Comm.*, 896 F.2d 780, 784-85 (3d Cir. 1990).

Second, the Court concluded that the law, like a law it had struck down in 1957, "denied adults their free speech rights by allowing them to read only what was acceptable for children". *Sable*, 492 U.S. at 126 (citing *Butler v. Michigan*, 352 U.S. 380, (1957)). Thus, any regulation of dial-a-porn would have to give adults the opportunity to partake of that medium. *Id.* This conclusion echoes *Bolger*. *See Bolger*, 463 U.S. at 74 ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.").[18]

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[18] *Sable* is arguably not a decision about mass communication. Unlike *Red Lion*, *Tornillo*, or *Turner*, the Court in *Sable* reached no conclusions about the proper fit between the First Amendment and governmental regulation of the telephone. The case also includes no discussion of the technology of the telephone generally. The plaintiff in that case, a purveyor of dial-a-porn, challenged the statute only with respect to that type of content. *Sable*, 492 U.S. at 117-18. Thus, the Court's opinion discussed only the "dial-in services". *Id.* at 128. Since every telephone call at issue was, by definition, dial-a-*porn*, every telephone call was, by definition, either obscene or indecent. *Id.* at 132 (Scalia, J., concurring).

Here, however, plaintiffs represent forty-seven different speakers (including educational associations and consortia) who provide content to the Internet on a broad range of topics. The limited reach of the *Sable* holding renders it inapt to the Internet communications of the plaintiffs in these actions.

Finally, in *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445 (1994), the Supreme Court implicitly limited *Pacifica* once again when it declined to adopt the broadcast rationale for the medium of cable television. The Court concluded that the rules for broadcast were "inapt" for cable because of the "fundamental technological differences between broadcast and cable transmission". *Id.* at 2457.

The legal significance to this case of *Turner*'s refusal to apply the broadcast rules to cable television cannot be overstated. *Turner*'s holding confirms beyond doubt that the holding in *Pacifica* arose out of the scarcity rationale unique to the underlying technology of broadcasting, and not out of the end product that the viewer watches. That is, *cable* television has no less of a "uniquely pervasive presence" than *broadcast* television, nor is cable television more "uniquely accessible to children" than broadcast. *See Pacifica*, 438 U.S. at 748-49. From the viewer's perspective, cable and broadcast television are identical: moving pictures with sound from a box in the home. Whether one receives a signal through an antenna or through a dedicated wire, the end result is just television in either case. In declining to extend broadcast's scarcity rationale for cable, the Supreme Court also implicitly limited *Pacifica*, the holding of which flows directly from that rationale.[19]

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[19] I note here, too, that we have found as a fact that operation of a computer is not as simple as turning on a television, and that the assaultive nature of television, *see Pacifica*, 438 U.S. at 748-49, is quite absent in Internet use. *See* Findings 87-89. The use of warnings and headings, for example, will normally shield users from immediate entry into a sexually explicit Web site or newsgroup message. *See* Finding 88. The

Turner thus confirms that the analysis of a particular medium of mass communication must focus on the underlying technology that brings the information to the user. In broadcast, courts focus on the limited number of band widths and the risk of interference with those frequencies. *See, e.g.*, *Turner*, 114 S.Ct. at 2456-57. In cable, courts focus on the number of channels, the different kinds of cable operators, and the cost to the consumer. *Id.* at 2452.

I draw two conclusions from the foregoing analysis. First, from the Supreme Court's many decisions regulating different media differently, I conclude that we cannot simply assume that the Government has the power to regulate protected speech over the Internet, devoting our attention solely to the issue of whether the CDA is a constitutional exercise of that power. Rather, we must also decide the validity of the underlying assumption as well, to wit, whether the Government has the power to regulate protected speech at all. That decision must take into account the underlying technology, and the actual and potential reach, of that medium. Second, I conclude that *Pacifica*'s holding is not persuasive authority here, since plaintiffs and the Government agree that Internet communication is an abundant and growing resource. Nor is *Sable* persuasive authority, since the Supreme Court's holding in that case addressed only one particular type of communication (dial-a-porn), and reached no conclusions about the proper fit between the First Amendment and telephone communications generally. Again, plaintiffs and the Govern-

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Government may well be right that sexually explicit content is just a few clicks of a mouse away from the user, but there is an immense legal significance to those few clicks.

ment here agree that the Internet provides content as broad as the imagination.

3. The Effect of the CDA and the Novel Characteristics of Internet Communication

Over the course of five days of hearings and many hundreds of pages of declarations, deposition transcripts, and exhibits, we have learned about the special attributes of Internet communication. Our Findings of fact—many of them undisputed—express our understanding of the Internet. These Findings lead to the conclusion that Congress may not regulate indecency on the Internet at all.

Four related characteristics of Internet commnication have a transcendent importance to our shared holding that the CDA is unconstitutional on its face. We explain these characteristics in our Findings of fact above, and I only rehearse them briefly here. First, the Internet presents very low barriers to entry. Second, these barriers to entry are identical for both speakers and listeners. Third, as a result of these low barriers, astoundingly diverse content is available on the Internet. Fourth, the Internet provides significant access to all who wish to speak in the medium, and even creates a relative parity among speakers.

To understand how disruptive the CDA is to Internet communication, it must be remembered that the Internet evolved free of content-based considerations. Before the CDA, it only mattered how, and how quickly, a particular packet of data travelled from one point on the Internet to another. In its earliest incarnation as the ARPANET, the Internet was for many years a private means of access among the

military, defense contractors, and defense-related researchers. The developers of the technology focused on creating a medium designed for the rapid transmittal of the information through overlapping and redundant connections, and without direct human involvement. Out of these considerations evolved the common transfer protocols, packet switching, and the other technology in which today's Internet users flourish. The content of the data was, before the CDA, an irrelevant consideration.

It is fair, then, to conclude that the benefits of the Internet to private speakers arose out of the serendipitous development of its underlying technology. As more networks joined the "network of networks" that is the Internet, private speakers have begun to take advantage of the medium. This should not be surprising, since participation in the medium requires only that networks (and the individual users associated with them) agree to use the common data transfer protocols and other medium-specific technology. Participation does not require, and has never required, approval of a user's or network's content.

After the CDA, however, the content of a user's speech will determine the extent of participation in the new medium. If a speaker's content is even arguably indecent in some communities, he must assess, *inter alia*, the risk of prosecution and the cost of compliance with the CDA. Because the creation and posting of a Web site allows users anywhere in the country to see that site, many speakers will no doubt censor their speech so that it is palatable in every community. Other speakers will decline to enter the medium at all. Unlike other media, there is no technologically feasible way for an Internet

speaker to limit the geographical scope of his speech (even if he wanted to), or to "implement[ ] a system for screening the locale of incoming" requests. *Sable* 492 U.S. at 125.

The CDA will, without doubt, undermine the substantive, speech-enhancing benefits that have flowed from the Internet. Barriers to entry to those speakers affected by the Act would skyrocket, especially for non-commercial and not-for-profit information providers. Such costs include those attributable to age or credit card verification (if possible), tagging (if tagging is even a defense under the Act[20], and monitoring or review of one's content.

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[20] In a May 3, 1996 letter to a three-judge court in the Southern District of New York, John C. Keeney, Acting Assistant Attorney General in the Criminal Division of the Department of Justice, has advised that tagging would be "substantial evidence" in support of a § 223(e)(5)(A) defense:

> Under present technology, non-commercial content providers can take steps to list their site[s] in URL registries of covered sites, register their site[s] with the marketplace of browsers and blocking software (including listing an IP address), place their material in a directory blocked by screening software, or take other similarly effective affirmative steps to make their site[s] known to the world to allow the site[s] to be blocked. Under present technology, it is the position of the Department of Justice that, absent extraordinary circumstances, such efforts would constitute substantial evidence that a content provider had taken good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to the covered material. The same would be true for tagging by content providers coupled with evidence that the tag would be screened by the marketplace of browsers and blocking software.

The diversity of the content will necessarily diminish as a result. The economic costs associated with compliance with the Act will drive from the Internet speakers whose content falls within the zone of possible prosecution. Many Web sites, newsgroups, and chat rooms will shut down, since users cannot discern the age of other participants. In this respect, the Internet would ultimately come to mirror broadcasting and print, with messages tailored to a

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Letter of May 3, 1996 from Acting Assistant Attorney General John C. Keeney to Hons. Denise L. Cote, Leonard B. Sand, and Jose A. Cabranes, attached to Defendants' Motion for Leave to File Supplemental Statement. On May 8, 1996, the Government moved to file the Kenney letter in this action, and we granted the motion as unopposed the next day.

The letter certainly raises more questions than it answers. I wonder, for example, whether it is consistent with the plain language of the Act simply for content providers to "make their site[s] known to the world" and thereby "to allow [them] to be blocked", even though this form of notice alone would not reduce the availability of indecent content. *Cf.* Senate Report at 178, 1996 U.S.C.C.A.N. at 201 (noting that § 223(d) "applies to content providers who post indecent material for online display without taking precautions that shield that material from minors"). It is also an unanswered question whether the Keeney letter would eliminate any of the CDA's chill, since the Government acknowledged that the letter would not prohibit a United States Attorney from taking a contrary position in a particular prosecution. *See* Defendants' May 9, 1996 Response to the May 8, 1996 Order of Court. The letter also fails to mention how users who participate in chat rooms, newsgroups, listservs, and e-mail might take advantage of § 223(e)(5)(A). Finally, it is undisputed that neither PICS nor the hypothetical "-L18" tag are available to speakers using the World Wide Web today, whom the Government has explicitly reserved its right to prosecute should the CDA ultimately be found constitutional. *See* Stipulation and Order of February 26, 1996, *quoted supra*.

mainstream society from speakers who could be sure that their message was likely decent in every community in the country.

The CDA will also skew the relative parity among speakers that currently exists on the Internet. Commercial entities who can afford the costs of verification, or who would charge a user to enter their sites, or whose content has mass appeal, will remain unaffected by the Act. Other users, such as Critical Path or Stop Prisoner Rape, or even the ACLU, whose Web sites before the CDA were as equally accessible as the most popular Web sites, will be profoundly affected by the Act. This change would result in an Internet that mirrors broadcasting and print, where economic power has become relatively coterminous with influence.

Perversely, commercial pornographers would remain relatively unaffected by the Act, since we learned that most of them already use credit card or adult verification anyway. Commercial pornographers normally provide a few free pictures to entice a user into proceeding further into the Web site. To proceed beyond these teasers, users must provide a credit card number or adult verification number. The CDA will force these businesses to remove the teasers (or cover the most salacious content with cgi scripts), but the core, commercial product of these businesses will remain in place.

The CDA's wholesale disruption on the Internet will necessarily affect adult participation in the medium. As some speakers leave or refuse to enter the medium, and others bowdlerize their speech or erect the barriers that the Act envisions, and still others remove bulletin boards, Web sites, and

newsgroups, adults will face a shrinking ability to participate in the medium. Since much of the communication on the Internet is participatory, *i.e.*, is a form of dialogue, a decrease in the number of speakers, speech fora, and permissible topics will diminish the worldwide dialogue that is the strength and signal achievement of the medium.

It is no answer to say that the defenses and exclusions of § 223(e) mitigate the disruptive forces of the Act. We have already found as facts that the defenses either are not available to plaintiffs here or would impose excessive costs on them. These defenses are also unavailable to participants in specific forms of Internet communication.

I am equally dubious that the exclusions of § 223(e) would provide significant relief from the Act. The "common carrier" exclusion of § 223(e)(1), for example, would not insulate America Online from liability for the content it provides to its subscribers. It is also a tricky question whether an America Online chat room devoted to, say, women's reproductive health, is or is not speech of the service itself, since America Online, at least to some extent, "creat[es] the content of the communication" simply by making the room available and assigning it a topic. Even if America Online has no liability under this example, the service might legitimately choose not to provide fora that led to the prosecution of its subscribers. Similarly, it is unclear whether many caching servers are devoted "solely" to the task of "intermediate storage". The "vicarious liability" exclusion of § 223(e)(4) would not, for example, insulate either a college professor or her employer from liability for

posting an indecent online reading assignment for her freshman sociology class.

We must of course give appropriate deference to the legislative judgments of Congress. *See Sable*, 492 U.S. at 129; *Turner*, 114 S. Ct. at 2472-73 (Blackmun, J., concurring). After hearing the parties' testimony and reviewing the exhibits, declarations, and transcripts, we simply cannot in my view defer to Congress's judgment that the CDA will have only a minimal impact on the technology of the Internet, or on adult participation in the medium. As in *Sable*, "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Sable*, 492 U.S. at 129 (citation omitted). Indeed, the Government has not revealed Congress's "extensive record" in addressing this issue, *Turner*, 114 S. Ct. at 2472 (Blackmun, J., concurring), or otherwise convinced me that the record here is somehow factually deficient to the record before Congress when it passed the Act.

4. Diversity and Access on the Internet

Nearly eighty years ago, Justice Holmes, in dissent, wrote of the ultimate constitutional importance of the "free trade in ideas":

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . .

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

For nearly as long, critics have attacked this much-maligned "marketplace" theory of First Amendment jurisprudence as inconsistent with economic and practical reality. Most marketplaces of mass speech, they charge, are dominated by a few wealthy voices. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 248-50 (1974). These voices dominate—and to an extent, create—the national debate. *Id.* Individual citizens' participation is, for the most part, passive. *Id.* at 251. Because most people lack the money and time to buy a broadcast station or create a newspaper, they are limited to the role of listeners, *i.e.*, as watchers of television or subscribers to newspapers. *Id.*

Economic realities limit the number of speakers even further. Newspapers competing with each other and with (free) broadcast tend toward extinction, as fixed costs drive competitors either to consolidate or leave the marketplace. *Id.* at 249-50. As a result, people receive information from relatively few sources:

> The elimination of competing newspapers in most of our large cities, and the concentration of control of media that results from the only newspaper's being owned by the same interests which own a television station and a radio station, are important components of this trend toward concentration of control of outlets to inform the public.

> The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion.

Id. at 249.

The Supreme Court has also recognized that the advent of cable television has not offered significant relief from this problem. Although the number of cable channels is exponentially greater than broadcast, *Turner*, 114 S. Ct. at 2452, cable imposes relatively high entry costs, *id.* at 2451-52 (noting that the creation of a cable system requires "[t]he construction of [a] physical infrastructure").

Nevertheless, the Supreme Court has resisted governmental efforts to alleviate these market dysfunctions. In *Tornillo*, the Supreme Court held that market failure simply could not justify the regulation of print, 418 U.S. at 258, regardless of the validity of the criticisms of that medium, *id.* at 251. *Tornillo* invalidated a state "right-of-reply" statute, which required a newspaper critical of a political candidate to give that candidate equal time to reply to the charges. *Id.* at 244. The Court held that the statute would be invalid even if it imposed no cost on a newspaper, because of the statute's intrusion into editorial discretion:

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair —constitute the exercise of editorial control and judgment.

Id. at 258.

Similarly, in *Turner*, the Supreme Court rejected the Government's argument that market dysfunction justified deferential review of speech regulations for cable television. Even recognizing that the cable market "suffers certain structural impediments", *Turner*, 114 S. Ct. at 2457, the Court could not accept the Government's conclusion that this dysfunction justified broadcast-type standards of review, since "the mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation from the First Amendment standards applicable to nonbroadcast media." *Id.* at 2458. "[L]aws that single out the press, or certain elements thereof, for special treatment 'pose a particular danger of abuse by the State,' and so are always subject to at least some degree of heightened First Amendment scrutiny." *Id.* (citation omitted).[21] The Court then eloquently reiterated that government-imposed, content-based speech regulations are generally inconsistent with "[o]ur political system and cultural life":

> At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal. Government action that stifles speech on account

[21] *Turner* examined certain "must-carry" provisions under an intermediate scrutiny, since those laws imposed incidental burdens on speech but did not directly regulate content. *Turner*, 114 S. Ct. at 2469. The Court remanded the case to the district court without passing on the constitutionality of the must-carry provisions. *Id.* at 2472.

> of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion. These restrictions "rais[e] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace."

Id. (citation omitted).

Both *Tornillo* and *Turner* recognize, in essence, that the cure for market dysfunction (government-imposed, content-based speech restrictions) will almost always be worse than the disease. Here, however, I am hard-pressed even to identify the disease. It is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country--and indeed the world—has yet seen. The plaintiffs in these actions correctly describe the "democratizing" effects of Internet communication: individual citizens of limited means can speak to a worldwide audience on issues of concern to them. Federalists and Anti-Federalists may debate the structure of their government nightly, but these debates occur in newsgroups or chat rooms rather than in pamphlets. Modern-day Luthers still post their theses, but to electronic bulletin boards rather than the door of the Wittenberg Schlosskirche. More mundane (but from a constitutional perspective, equally important) dialogue occurs between aspiring

artists, or French cooks, or dog lovers, or fly fishermen.

Indeed, the Government's asserted "failure" of the Internet rests on the implicit premise that *too much* speech occurs in that medium, and that speech there is *too available* to the participants. This is *exactly* the benefit of Internet communication, however. The Government, therefore, implicitly asks this court to limit both the amount of speech on the Internet and the availability of that speech. This argument is profoundly repugnant to First Amendment principles.

My examination of the special characteristics of Internet communication, and review of the Supreme Court's medium-specific First Amendment jurisprudence, lead me to conclude that the Internet deserves the broadest possible protection from government-imposed, content-based regulation. If "the First Amendment erects a virtually insurmountable barrier between government and the print media", *Tornillo*, 418 U.S. at 259 (White, J., concurring), even though the print medium *fails* to achieve the hoped-for diversity in the marketplace of ideas, then that "insurmountable barrier" must also exist for a medium that *succeeds* in achieving that diversity. If our Constitution "prefer[s] 'the power of reason as applied through public discussion'", *id.* (citation omitted), "[r]egardless of how beneficent-sounding the purposes of controlling the press might be", *id.*, even though "occasionally debate on vital matters will not be comprehensive and . . . all viewpoints may not be expressed", *id.* at 260, a medium that does capture comprehensive debate and does allow for the expression of all viewpoints should receive at least the same protection from intrusion.

Finally, if the goal of our First Amendment jurisprudence is the "individual dignity and choice" that arises from "putting the decision as to what views shall be voiced largely into the hands of each of us", *Leathers v. Medlock*, 499 U.S. 439, 448-49 (1991) (citing *Cohen v. California*, 403 U.S. 15, 24 (1971)), then we should be especially vigilant in preventing content-based regulation of a medium that every minute allows individual citizens actually to make those decisions. Any content-based regulation of the Internet, no matter how benign the purpose, could burn the global village to roast the pig. *Cf. Butler*, 352 U.S. at 383.

5. Protection of Children from Pornography

I accept without reservation that the Government has a compelling interest in protecting children from pornography. The proposition finds one of its clearest expressions in Mill, who recognized that his exposition regarding liberty itself "is meant to apply only to human beings in the maturity of their faculties":

> We are not speaking of children or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others must be protected against their own actions as well as against external injury.

John Stuart Mill, *On Liberty* 69 (Gertrude Himmelfarb ed., Penguin Books 1982) (1859), *cited in* Harry Kalven Jr., *A Worthy Tradition* 54 (Jamie Kalven ed. 1988).

This rationale, however, is as dangerous as it is compelling. Laws regulating speech for the protection of children have no limiting principle, and a

well-intentioned law restricting protected speech on the basis of its content is, nevertheless, state-sponsored censorship. Regulations that "drive certain ideas or viewpoints from the marketplace" for children's benefit, *Simon & Schuster*, 502 U.S. at 116, risk destroying the very "political system and cultural life", *Turner*, 114 S. Ct. at 2458, that they will inherit when they come of age.

I therefore have no doubt that a Newspaper Decency Act, passed because Congress discovered that young girls had read a front page article in the *New York Times* on female genital mutilation in Africa, would be unconstitutional. *Tornillo*, 418 U.S. at 258. Nor would a Novel Decency Act, adopted after legislators had seen too many pot-boilers in convenience store book racks, pass constitutional muster. *Butler*, 352 U.S. at 383. There is no question that a Village Green Decency Act, the fruit of a Senator's overhearing of a ribald conversation between two adolescent boys on a park bench, would be unconstitutional. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). A Postal Decency Act, passed because of constituent complaints about unsolicited lingerie catalogues, would also be unconstitutional. *Bolger*, 463 U.S. at 73. In these forms of communication, regulations on the basis of decency simply would not survive First Amendment scrutiny.

The Internet is a far more speech-enhancing medium than print, the village green, or the mails. Because it would necessarily affect the Internet itself, the CDA would necessarily reduce the speech available for adults on the medium. This is a constitutionally intolerable result.

Some of the dialogue on the Internet surely tests the limits of conventional discourse. Speech on the Internet can be unfiltered, unpolished, and unconventional, even emotionally charged, sexually explicit, and vulgar—in a word, "indecent" in many communities. But we should expect such speech to occur in a medium in which citizens from all walks of life have a voice. We should also protect the autonomy that such a medium confers to ordinary people as well as media magnates.

Moreover, the CDA will almost certainly fail to accomplish the Government's interest in shielding children from pornography on the Internet. Nearly half of Internet communications originate outside the United States, and some percentage of that figure represents pornography. Pornography from, say, Amsterdam will be no less appealing to a child on the Internet than pornography from New York City, and residents of Amsterdam have little incentive to comply with the CDA.[22]

My analysis does not deprive the Government of all means of protecting children from the dangers of Internet communication. The Government can continue to protect children from pornography on the Internet through vigorous enforcement of existing laws criminalizing obscenity and child pornography. *See United States v. Thomas*, 74 F.3d 701, 704-05 (6th

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[22] Arguably, a valid CDA would create an incentive for overseas pornographers *not* to label their speech. If we upheld the CDA, foreign pornographers could reap the benefit of unfettered access to American audiences. A valid CDA might also encourage American pornographers to relocate in foreign countries or at least use anonymous remailers from foreign servers.

Cir. 1995). As we learned at the hearing, there is also a compelling need for public education about the benefits and dangers of this new medium, and the Government can fill that role as well. In my view, our action today should only mean that the Government's permissible supervision of Internet content stops at the traditional line of unprotected speech.

Parents, too, have options available to them. As we learned at the hearing, parents can install blocking software on their home computers, or they can subscribe to commercial online services that provide parental controls. It is quite clear that powerful market forces are at work to expand parental options to deal with these legitimate concerns. More fundamentally, parents can supervise their children's use of the Internet or deny their children the opportunity to participate in the medium until they reach an appropriate age. *See Fabulous*, 896 F.2d at 788-89 (noting that "our society has traditionally placed" these decisions "on the shoulders of the parent").

E. Conclusion

Cutting through the acronyms and *argot* that littered the hearing testimony, the Internet may fairly be regarded as a never-ending worldwide conversation. The Government may not, through the CDA, interrupt that conversation. As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion.

True it is that many find some of the speech on the Internet to be offensive, and amid the din of cyberspace many hear discordant voices that they regard as indecent. The absence of governmental regulation

of Internet content has unquestionably produced a kind of chaos, but as one of plaintiffs' experts put it with such resonance at the hearing:

> What achieved success was the very chaos that the Internet is. The strength of the Internet is that chaos.[23]

Just as the strength of the Internet is chaos, so the strength of our liberty depends upon the chaos and cacophony of the unfettered speech the First Amendment protects.

For these reasons, I without hesitation hold that the CDA is unconstitutional on its face.

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[23] Testimony of March 22, 1996, at 167.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Civil Action Nos. 96-963, 96-1458

AMERICAN CIVIL LIBERTIES UNION, ET AL.

v.

JANET RENO, ATTORNEY GENERAL
OF THE UNITED STATES

AMERICAN LIBRARY ASSOCIATION, INC., ET AL.

v.

UNITED STATES DEP'T OF JUSTICE, ET AL.

ORDER

AND NOW, this 11th day of June, 1996, upon consideration of plaintiffs' motions for preliminary injunction, and the memoranda of the parties and *amici curiae* in support and opposition thereto, and after hearing, and upon the findings of fact and conclusions of law set forth in the accompanying Adjudication, it is hereby ORDERED that:

1. The motions are GRANTED;

2. Defendant Attorney General Janet Reno, and all acting under her direction and control, are PRELIMINARILY ENJOINED from enforcing, prosecuting, investigating or reviewing any matter premised upon:

(a) Sections 223(a)(1)(B) and 223(a)(2) of the Communications Decency Act of 1996 ("the CDA"), Pub. L. No. 104-104, § 502, 110 Stat. 133, 133-36, to the extent such enforcement, prosecution, investigation, or review are based upon allegations other than obscenity or child pornography; and

(b) Sections 223(d)(1) and 223(d)(2) of the CDA;

3. Pursuant to Fed. R. Civ. P. 65(c), plaintiffs need not post a bond for this injunction, *see Temple Univ. v. White*, 941 F.2d 201, 220 (3d Cir. 1991), *cert. denied sub nom. Snider v. Temple Univ.*, 502 U.S. 1032 (1992); and

4. The parties shall advise the Court, in writing, as to their views regarding the need for further proceedings on the later of (a) thirty-one days from the date of this Order, or (b) ten days after final appellate review of this Order.

By the Court

/s/ DOLORES K. SLOVITER
DOLORES K. SLOVITER, C.J.
U.S. Court of Appeals for the
Third Circuit

/s/ RONALD L. BUCKWALTER
RONALD L. BUCKWALTER, J.

/s/ STEWART DALZELL
STEWART DALZELL, J.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Civ. A. No. 96-0963

AMERICAN CIVIL LIBERTIES UNION, *ET AL.*, PLAINTIFFS

v.

JANET RENO, IN HER OFFICIAL CAPACITY AS
ATTORNEY GENERAL OF THE UNITED STATES,
DEFENDANT

Civ. A. No. 96-1458

AMERICAN LIBRARY ASSOCIATION, INC., *ET AL.*,
PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF JUSTICE, *ET AL.*,
DEFENDANTS

[Filed: June 28, 1996]

ORDER ON MOTION FOR CLARIFICATION

AND NOW, this 28 day of June, 1996, upon Defendants' Unopposed Motion for Clarification and Amendment of Preliminary Injunction Pursuant to Rule 60, and good cause appearing, it is HEREBY ORDERED THAT the Motion is GRANTED and it is further ORDERED THAT paragraph 2(a) of this Court's ORDER dated June 11, 1996 (entered June 12, 1996) is hereby clarified as follows:

Defendants are enjoined from enforcing, prosecuting, investigating or reviewing matters premised upon 47 U.S.C. § 223(a)(2) only with respect to the prohibited activities specified in § 223(a)(1)(B) as they relate to "indecent" communications. Defendants are not enjoined from enforcing, prosecuting, investigating or reviewing allegations of violations of § 223(a)(2): (i) based on prohibited activities specified in § 223(a)(1)(A), (C), (D), or (E); or (ii) based on prohibited obscenity or child pornography activities as specified in § 223(a)(1)(B).

The Court's Preliminary Injunction Order entered June 12, 1996, is unchanged in all other respects.

This clarification order shall not extend the date of the entry of the preliminary injunction order shall not extend the date of the entry of the preliminary injunction order (June 12, 1996) for purposes of determining the time period permitted for taking an appeal of the preliminary injunction order pursuant to § 561(b) of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 561(b), 110 Stat. 143.

By The Court

/s/ DOLORES K. SLOVITER
DOLORES K. SLOVITER, C.J.
U.S. Court of Appeals for the
Third Circuit

/s/ RONALD L. BUCKWALTER
RONALD L. BUCKWALTER, J.

/s/ STEWART DALZELL per
STEWART DALZELL, J.

6-28-96
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APPENDIX D

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 96-963

AMERICAN CIVIL LIBERTIES UNION, *ET AL.*, PLAINTIFFS

v.

JANET RENO, DEFENDANT

[Feb. 15, 1996]

MEMORANDUM

BUCKWALTER, J.

I. BACKGROUND

Plaintiffs are providers and users of on-line communications. The affidavits filed in support of plaintiffs' request for a temporary restraining order (TRO) support the statement in plaintiffs' brief (page 2) that these communications deal with issues involving sexuality, reproduction, human rights, social responsibility, environmental concerns, labor, conflict resolution, as well as other issues, all of which have significant educational, political, medical, artistic, literary and social value.

On February 8, 1996, President Clinton signed into law the Telecommunications Act of 1996. Title V of the Act includes the provisions of the Communica-

tions Decency Act of 1996 (CDA), codified at 47 U.S.C. §223(a) to (h).

Pertinent to the matter now before this court, §223(a)(1)(B) provides:

> (a) Whoever—
>
> (1) in interstate or foreign communications—
>
> (B) by means of a telecommunications device knowingly —
>
> (i) makes, creates, or solicits, and
>
> (ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication;

Section 223(d) provides:

> (d) Whoever—
>
> (1) in interstate or foreign communications knowingly —
>
> (A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or
>
> (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or
>
> (2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18 United State Code, or imprisoned not more than two years, or both.

In seeking a TRO with regard to the above provisions[1], plaintiffs claim that they will be irreparably harmed because their rights under the First Amendment will be infringed. They fear prosecution under the CDA because as a result of the vagueness of the crimes created by the Act, they do not even know what speech or other actions might subject them to prosecution. Thus, even attempts to self-censor could prove fruitless. There is also the concern by those plaintiffs who rely on on-line providers and other carriers that these providers will likely ban communications that they consider potentially "indecent" or "patently offensive" in order to avoid criminal prosecution themselves, thereby depriving plaintiffs of the ability to communicate about important issues.

The defendant counters by stating that there must be a realistic danger of sustaining a direct injury as a result of the statute's enactment or enforcement, apparently suggesting that plaintiffs' fears of prosecution are imaginary or speculative. There is no

---

[1] Plaintiffs have also sought the same relief as to 18 U.S.C. §1462, but at this early stage of the litigation, it seems clear that no irreparable harm will befall plaintiffs. (See. Gov't Ex. 13).

evidence on the present record to suggest defendant's position is correct in the latter regard.

Moreover, the defendant's brief quotes a portion of a Third Circuit case for the proposition that "the assertion of First Amendment rights does not automatically require a finding of irreparable injury." What the defendant failed to cite from that case was the sentence immediately preceding the above quote which was, "It is well established that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Hobe v. Casey*, 868 F.2d 69, at p. 72, 73 (3d Cir. 1989). The *Hobe* case goes on to explain that plaintiff must show "a chilling effect on free expression." That has been shown in this case by affidavits previously referred to.

What likelihood is there that plaintiffs will prevail on the merits? In Wright & Kans, Federal Practice and Procedure: Civil 2d §2948.3, it is suggested that this concept of probability of success on the merits must be considered and balanced with the comparative injuries of the parties.

As the Second Circuit put it, when

> the balance of hardship tips decidedly toward plaintiff . . . it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation. *Hamilton Watch Co. v. Henrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953).

I believe plaintiffs have, at least with regard to 47 U.S.C. §223(a)(1)(B)(ii) and (a)(2) raised serious, substantial, difficult and doubtful questions which are fair grounds for this litigation.

In explaining my reason for this conclusion, I will not go through a piecemeal analysis of the cases, all of which have been set forth in both plaintiffs' and defendant's briefs, except, perhaps, in passing while discussing the respective arguments of the parties.

First of all, I have no quarrel with the argument that Congress has a compelling interest in protecting the physical and psychological well-being of minors. Moreover, at least from the evidence before me, plaintiffs have not convinced me that Congress has failed to narrowly tailor the CDA.

Where I do feel that the plaintiffs have raised serious, substantial, difficult and doubtful questions is in their argument that the CDA is unconstitutionally vague in the use of the undefined term, "indecent." §223(a)(1)(B)(ii).

This strikes me as being serious because the undefined word "indecent", standing alone, would leave reasonable people perplexed in evaluating what is or is not prohibited by the statute.

It is a substantial question because this word alone is the basis for a criminal felony prosecution.

It is a difficult question, I think, because any laws affecting freedoms such as the one here in question have spawned opinions which arguably support both sides.

Finally, it is a doubtful question because it simply is not clear, contrary to what the government suggests, that the word "indecent" has ever been defined by the Supreme Court. *See Alliance for Community Media v. F.C.C.*, 56 F.3d 105 (D.C. Cir. 1995) p. 130, footnote 2:

> We note that the Supreme Court has never actually passed on the FCC's broad definition of "indecency". *See Action for Children's Television v. FCC*, 852 F.2d 1322, 1338-39 (D.C. Cir. 1988) (acknowledging that in *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978), the Supreme Court never specifically addressed whether the FCC's generic definition of indecency was unconstitutionally vague, but arguing that because the Court "implicitly" approved the definition by relying on it, lower courts are barred from addressing the vagueness issue on the merits.

Parenthetically, I had reached the same conclusion as Judge Wald, author of the above footnote, before reading Alliance for Community Media. That, of course, does not mean that we are correct but it did reinforce my belief that the question of vagueness is a difficult and doubtful one.

In connection with the vagueness argument, the government correctly states that plaintiffs face a most difficult challenge. That challenge has been stated as one in which "the challenger must establish that no set of circumstances exists under which the Act would be valid." *Rust v. Sullivan*, 500 U.S. 173, 183 (1990) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987).

It is hard to imagine a set of circumstances where an act proscribing certain conduct could be rendered valid if the description of that conduct, the violation of which is a felony, is vague.

Defendant seems to argue that an indecent communication means the same as a communication that in context, depicts or describes, "in terms patently offensive as measured by contemporary community

> standards, sexual or excretory activities or organs. . . ."

While I do not believe the patently offensive provision of §223(d)(1), quoted above, is unconstitutionally vague, I do not see how that applies to the undefined use of the word "indecent" in §223(a)(1)(B)(ii). Depending on who is making the judgment, indecent could include a whole range of conduct not encompassed by "patently offensive."

The remaining considerations relative to a TRO request weigh in favor of plaintiffs. I have not overlooked or ignored the outstanding argument made by the government in part 1 of its brief. I particularly have pondered the oft cited quote: When a court is asked to invalidate a "statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, it should only do so for the most compelling constitutional reasons." *Mistretta v. United States*, 488 U.S. 361, 384 (1989), p. 17 of defendant's brief.

It is, of course, impossible to define conduct with mathematical certainty, but on the other hand, it seems to me that due process, particularly in the arena of criminal statutes, requires more than one vague, undefined word, "indecent."

It is a most compelling constitutional reason to require of a law that it reasonably informs a person of what conduct is prohibited particularly when the violation of the law may result in fines, imprisonment, or both.

An order follows.

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 96-963

AMERICAN CIVIL LIBERTIES UNION, *ET AL.*, PLAINTIFFS

v.

JANET RENO, DEFENDANT

ORDER

This case is before the court on plaintiffs' motion for a temporary restraining order against enforcement of both 47 U.S.C. §223(a)(1)(B) (as amended by the Telecommunications Act of 1996, §502), and 47 U.S.C. §223(d). The court having considered plaintiffs' submissions in support of their motion, and defendants' submissions in opposition thereto,

IT IS HEREBY ORDERED THAT plaintiffs' motion for a temporary restraining order is GRANTED, in part, as follows:

The defendant, her agents, and her servants are hereby ENJOINED from enforcing against plaintiffs the provisions of 47 U.S.C. §223(a)(1)(B)(ii), insofar as they extend to "indecent", but no "obscene". The plaintiffs' motion is in all other respects, DENIED.

Unless previously ordered by this court, pursuant to 28 U.S.C. §2284(b)(3), this order shall remain in force only until the hearing and determination by the district court of three judges of the application for a preliminary injunction.

SO ORDERED this 15th day of February, 1996.

By the Court

/s/ RONALD L. BUCKWALTER
RONALD L. BUCKWALTER, J.

cc: Counsel of record via FAX by chambers 2/15/96.

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIV. A. No. 96-0963

AMERICAN CIVIL LIBERTIES UNION, ET AL., PLAINTIFFS

v.

JANET RENO, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANT

CIV. A. No. 96-1458

AMERICAN LIBRARY ASSOCIATION, INC., ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL., DEFENDANTS

[Filed: July 1, 1996]

DEFENDANTS' NOTICE OF APPEAL

Notice is hereby given that defendant Janet Reno, in her official capacity as Attorney General of the United States, hereby appeals, pursuant to section 561(b) of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 561(b), 110 Stat. 143, to the Supreme Court of the United States from the Adjudication and

Order entered June 12, 1996, as clarified by the Order on Motion for Clarification entered on June 28, 1996, in *American Civil Liberties' Union, et al. v. Reno*, Civ. A. No. 96-0963 (E.D. Pa.).

Notice is also hereby given that defendants United States Department of Justice and Janet Reno, in her official capacity as Attorney General of the United States, hereby appeal, pursuant to section 561(b) of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 561(b), 110 Stat. 143, to the Supreme Court of the United States from the Adjudication and Order entered June 12, 1996, as clarified by the Order on Motion for Clarification entered on June 28, 1996, in *American Library Ass'n, et al. v. Department of Justice, et al.*, Civ. A. No. 96-1458 (E.D. Pa.)

Respectfully submitted,

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Date: July 1, 1996

APPENDIX F

STATUTORY PROVISIONS

Title V of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 133, provides in part:

TITLE V—OBSCENITY AND VIOLENCE

Subtitle A—Obscene, Harassing, and Wrongful Utilization of Telecommunications Facilities

SEC. 501. SHORT TITLE.

This title may be cited as the "Communications Decency Act of 1996".

SEC. 502. OBSCENE OR HARASSING USE OF TELECOMMUNICATIONS FACILITIES UNDER THE COMMUNICATIONS ACT OF 1934.

Section 223 (47 U.S.C. 223) is amended—

(1) by striking subsection (a) and inserting in lieu thereof:

"(a) Whoever—

"(1) in interstate or foreign communications—

"(A) by means of a telecommunications device knowingly—

"(i) makes, creates, or solicits, and

"(ii) initiates the transmission of,

any comment, request, suggestion, proposal, image, or other communication which is obscene, lewd, lascivious, filthy, or indecent, with intent to annoy, abuse, threaten, or harass another person;

"(B) by means of a telecommunications device knowingly—

"(i) makes, creates, or solicits, and

"(ii) initiates the transmission of,

any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication;

"(C) makes a telephone call or utilizes a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communications;

"(D) makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or

"(E) makes repeated telephone calls or repeatedly initiates communication with a telecommunications device, during which conversation or communication ensues, solely to

harass any person at the called number or who receives the communication; or

"(2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity,

shall be fined under title 18, United States Code, or imprisoned not more than two years, or both."; and

(2) by adding at the end the following new subsections:

"(d) Whoever—

"(1) in interstate or foreign communications knowingly—

"(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or

"(B) uses any interactive computer service to display in a manner available to a person under 18 years of age,

any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or

"(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity,

shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.

"(e) In addition to any other defenses available by law:

"(1) No person shall be held to have violated subsection (a) or (d) solely for providing access or connection to or from a facility, system, or network not under that person's control, including transmission, downloading, intermediate storage, access software, or other related capabilities that are incidental to providing such access or connection that does not include the creation of the content of the communication.

"(2) The defenses provided by paragraph (1) of this subsection shall not be applicable to a person who is a conspirator with an entity actively involved in the creation or knowing distribution of communications that violate this section, or who knowingly advertises the availability of such communications.

"(3) The defenses provided in paragraph (1) of this subsection shall not be applicable to a person who provides access or connection to a facility, system, or network engaged in the violation of this section that is owned or controlled by such person.

"(4) No employer shall be held liable under this section for the actions of an employee or agent unless the employee's or agent's conduct is within the scope of his or her employment or agency and the employer (A) having knowledge of such con-

duct, authorizes or ratifies such conduct, or (B) recklessly disregards such conduct.

"(5) It is a defense to a prosecution under subsection (a)(1)(B) or (d), or under subsection (a)(2) with respect to the use of a facility for an activity under subsection (a)(1)(B) that a person—

"(A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology; or

"(B) has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number.

"(6) The Commission may describe measures which are reasonable, effective, and appropriate to restrict access to prohibited communications under subsection (d). Nothing in this section authorizes the Commission to enforce, or is intended to provide the Commission with the authority to approve, sanction, or permit, the use of such measures. The Commission shall have no enforcement authority over the failure to utilize such measures. The Commission shall not endorse specific products relating to such measures. The use of such measures shall be admitted as evidence of good faith efforts for purposes of paragraph (5) in any action arising under subsection (d). Nothing in

this section shall be construed to treat interactive computer services as common carriers or telecommunications carriers.

"(f)(1) No cause of action may be brought in any court or administrative agency against any person on account of any activity that is not in violation of any law punishable by criminal or civil penalty, and that the person has taken in good faith to implement a defense authorized under this section or otherwise to restrict or prevent the transmission of, or access to, a communication specified in this section.

"(2) No State or local government may impose any liability for commercial activities or actions by commercial entities, nonprofit libraries, or institutions of higher education in connection with an activity or action described in subsection (a)(2) or (d) that is inconsistent with the treatment of those activities or actions under this section: *Provided, however*, That nothing herein shall preclude any State or local government from enacting and enforcing complementary oversight, liability, and regulatory systems, procedures, and requirements, so long as such systems, procedures, and requirements govern only intrastate services and do not result in the imposition of inconsistent rights, duties or obligations on the provision of interstate services. Nothing in this subsection shall preclude any State or local government from governing conduct not covered by this section.

"(g) Nothing in subsection (a), (d), (e), or (f) or in the defenses to prosecution under subsection (a) or (d) shall be construed to affect or limit the application or enforcement of any other Federal law.

"(h) For purposes of this section—

"(1) The use of the term 'telecommunications device' in this section—

"(A) shall not impose new obligations on broadcasting station licensees and cable operators covered by obscenity and indecency provisions elsewhere in this Act; and

"(B) does not include an interactive computer service.

"(2) The term 'interactive computer service' has the meaning provided in section 230(e)(2).

"(3) The term 'access software' means software (including client or server software) or enabling tools that do not create or provide the content of the communication but that allow a user to do any one or more of the following:

"(A) filter, screen, allow, or disallow content;

"(B) pick, choose, analyze, or digest content; or

"(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

"(4) The term 'institution of higher education' has the meaning provided in section 1201 of the Higher Education Act of 1965 (20 U.S.C. 1141).

"(5) The term 'library' means a library eligible for participation in State-based plans for funds under title III of the Library Services and Construction Act (20 U.S.C. 355e et seq.).".

* * * * *

Supreme Court, U.S.
FILED
OCT 31 1996
OFFICE OF THE CLERK

(3)

No. 96-511

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JANET RENO,
Attorney General of the United States, *et al.*,
Appellants,
v.
AMERICAN CIVIL LIBERTIES UNION, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

RESPONSE OF APPELLEES AMERICAN LIBRARY ASSOCIATION, ET AL., TO APPELLANTS' JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the three-judge district court was correct in preliminarily enjoining provisions of the Communications Decency Act of 1996 (the "CDA") that criminalize the sending or displaying of "indecent" or "patently offensive" speech, on the grounds that those provisions violate the First Amendment to the U.S. Constitution because they effectively ban the communication of constitutionally protected speech among adults, do not directly and substantially further the government's stated interest, and are not narrowly tailored to serve that interest.

2. Whether the three-judge district court was correct in preliminarily enjoining the CDA on the grounds that the terms "indecent" and "patently offensive" "in context," which will be applied to millions of legally unsophisticated speakers engaged in an extraordinarily diverse range of communications in cyberspace, are so vague as to violate the First and Fifth Amendments to the U.S. Constitution.

PARTIES TO THE PROCEEDINGS

Appellants are Janet Reno, the Attorney General of the United States, and the United States Department of Justice. Appellees are the American Civil Liberties Union, Human Rights Watch, Electronic Privacy Information Center, Electronic Frontier Foundation, Journalism Education Association, Computer Professionals for Social Responsibility, National Writers Union, Clarinet Communications Corp., Institute for Global Communications, Stop Prisoner Rape, AIDS Education Global Information System, Bibliobytes, Queer Resources Directory, Critical Path AIDS Project, Inc., Wildcat Press, Inc., Declan McCullagh d/b/a Justice on Campus, Brock Meeks d/b/a Cyberwire Dispatch, John Troyer d/b/a The Safer Sex Page, Jonathan Wallace d/b/a The Ethical Spectacle, Planned Parenthood Federation of America, Inc., American Library Association, Inc., America Online, Inc., American Booksellers Association, Inc., American Booksellers Foundation for Free Expression, American Society of Newspaper Editors, Apple Computer, Inc., Association of American Publishers, Inc., Association of Publishers, Editors and Writers, Citizens Internet Empowerment Coalition, Commercial Internet Exchange Association, CompuServe Incorporated, Families Against Internet Censorship, Freedom to Read Foundation, Inc., Health Sciences Libraries Consortium, Hotwired, Inc., Interactive Digital Software Association, Interactive Services Association, Magazine Publishers of America, Microsoft Corporation, The Microsoft Network, L.L.C., National Press Photographers Association, Netcom On-line Communications Services, Inc., Newspaper Association of America, Opnet, Inc., Prodigy Services Corp., Society of Professional Journalists, and Wired Ventures, Inc.

Pursuant to this Court's Rule 29.6, appellees American Library Ass'n *et al.* list the following parent companies and nonwholly owned subsidiaries of the corporate parties among them: Digital Marketing Services, Inc., H & R Block, Inc., International Wireless, Inc., Prodigy, Inc., and SonicNet, Inc.

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On Appeal from the United States District Court for the Eastern District of Pennsylvania

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RESPONSE OF APPELLEES AMERICAN LIBRARY ASSOCIATION, ET AL., TO APPELLANTS' JURISDICTIONAL STATEMENT

Pursuant to Rule 18.6 of the Rules of this Court, appellees American Library Association, *et al.*, respectfully submit this response to the government's jurisdictional statement.

INTRODUCTION

During much of this century, the mass media has been characterized by a limited number of speakers transmitting programming and information to essentially passive audiences. The communications medium of the twenty-first century—the Internet and cyberspace generally—is changing that, and will allow hundreds of millions of individuals to engage in interactive communication, on a national and global scale never before possible. The public square of the past—with pamphleteering, soap boxes,

and vigorous debate—is being replaced by the Internet, which enables average citizens to participate in national discourse, publish a newspaper, distribute an electronic pamphlet to the world, and generally to communicate to and with a broader audience than ever before possible. It also enables average citizens to gain access to a vast and literally world-wide range of information.

The Communictions Decency Act ("CDA" or the "Act")[1] represents Congress' first attempt to regulate speech content in this promising new medium. Unfortunately, Congress undertook this task without holding *any* hearings regarding the likely impact of the CDA on that medium. In the name of protecting children from inappropriate material they might encounter online, Congress clumsily attempted to graft regulations developed in the "dial-a-porn" context onto this very different, indeed unique, mode of communication.

After making precisely the kind of inquiry Congress failed to make—that is, undertaking five days of evidentiary hearings and considering massive amounts of documentary evidence, including extensive stipulated facts—the three-judge district court below preliminarily enjoined enforcement of provisions of the CDA that effectively ban "indecent" and "patently offensive" communications between adults. Appendix to Jurisdictional Statement ("J.S. App.") 148a-49a.[2] The district court unanimously held that appellees are likely to succeed in their claim that this ban violates the First Amendment.[3]

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[1] The CDA was enacted as Title V of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 56, 133-35, and will be codified at 47 U.S.C. §§ 223(a)-(h).

[2] Appellees did not challenge the application of the CDA to obscenity, child pornography, and unlawful child solicitation, and the court's order does not reach those applications. *See* J.S. App. 150a-51a.

[3] Subsequently, another three-judge district court, addressing a separate, and somewhat narrower challenge to the CDA, unanimously reached the same conclusion. *See Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996). The government has filed a jurisdictional statement in *Shea*, No. 96-595, urging this Court to hold *Shea* pending resolution of this case. Appellees agree that is the proper approach.

That judgment was clearly correct. Nevertheless, appellees appreciate that this case raises important constitutional questions regarding the application of traditional First Amendment principles to a new and increasingly important medium of communication, and therefore recognize that the Court is likely to grant plenary review regardless of the strength of the district court's decision. Although we believe the judgment below could be summarily affirmed, we understand that in this case of first impression, the Court may prefer to engage in a more comprehensive examination of this new medium, and of the extensive record compiled below. We agree that in the circumstances of this case, plenary review may be appropriate, even if, as we believe, the judgment below is plainly correct. Accordingly, we do not oppose the government's request for plenary review.[4]

However, we believe it is particularly important to this case of first impression that the Court have a clear understanding of precisely what was argued and decided below. For example, the government did *not* argue below, as it apparently does here, that Sections 223(a)(1)(B) and 223(d)(1)(A) of the CDA criminalize "indecent" or "patently offensive" speech only when the speaker *knows* that the *only* recipients of the speech are all under 18 years of age. Moreover, the government's jurisdictional statement frequently ignores dispositive findings of fact the government does not argue are erroneous. Accord-

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[4] We note that the government has *not* urged summary reversal. We note also that the plaintiffs/appellees ACLU *et al.* in the consolidated case *have* moved for summary affirmance. Obviously, appellees in this case would welcome that resolution, and our belief that the Court would probably prefer plenary review should not be understood as casting any doubt on the strength of that motion.

ingly, we submit this response in order to present a more complete picture of what was, and was not, decided below.

COUNTERSTATEMENT OF THE CASE

A. *Plaintiffs/Appellees in These Actions.*

Appellees in these two consolidated cases represent a broad and very diverse spectrum of content providers, service providers, and users of content on the Internet.[5] The appellee content providers include individuals, small non-profit organizations, libraries, book stores, and other speakers on the Internet. The appellee access providers include small or non-commercial "Internet service providers" ("ISPs") as well as the world's leading ISPs and commercial online services.

Collectively, appellees engage in or provide access to an enormous variety of speech on the Internet, *e.g.*, information about AIDS awareness, classical and modern literature, political commentary, and interactive discussions on an array of topics. All of this speech is appropriate and constitutionally protected for adults, and the vast majority of this speech is appropriate and constitutionally

[5] The plaintiffs/appellees in this case, *American Library Association, Inc., et al. v. United States Department of Justice, et al.*, are the American Library Association, Freedom to Read Foundation, America Online, Inc., Society of Professional Journalists, The Microsoft Network, L.L.C., Newspaper Association of America, Association of Publishers, Editors and Writers, Association of American Publishers, Inc., CompuServe Inc., Commercial Internet Exchange Association, Netcom Online Communications Services, Inc., Prodigy Services Corp., American Society of Newspaper Editors, Interactive Services Association, Microsoft Corp., American Booksellers Association, American Booksellers Foundation for Free Expression, Wired Ventures, Inc., OpNet Inc., Hotwired, Inc., The Health Sciences Libraries Consortium, Apple Computer, Inc., Citizens Internet Empowerment Coalitions, Families Against Internet Censorship, Interactive Digital Software Association, Magazine Publishers of America, and National Press Photographers Ass'n.

protected for most minors as well. Nevertheless, appellees engage in or provide access to some speech that, in some communities, could be considered "indecent" or "patently offensive." Such speech includes communications that contain the "seven dirty words" found patently offensive in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), information about sexual issues and problems, and images that depict sexually oriented subjects.

Among this diverse group of appellee content-providers, most do not charge money for the speech they make available over the Internet (some appellees provide and charge for *access* to the Internet or to an online service). Thus, users around the world generally can access appellees' speech on the Internet free of charge. Like other online speakers, appellees generally seek to make their speech available to the broadest possible audience, including listeners within and outside of the United States.

B. *The Three-Judge District Court's Decision.*

Appellants' statement of the case omits any reference to or discussion of the extensive and unusually detailed factual findings of the three-judge district court that formed the foundation for the decision on appeal. *See* J.S. App. 11a-61a. The Jurisdictional Statement fails to acknowledge the district court's critical factual findings that (1) it is impossible or infeasible for most Internet speakers to comply with the CDA's affirmative defenses; (2) because of the global nature of the Internet, the CDA will not effectively shield minors from indecent or patently offensive speech since a very substantial percentage of such speech is posted abroad, and will not be deterred by the CDA; and (3) parents can use currently available software and access provider options to control what Internet sites their children may access. These findings undergird the district court's legal conclusions that the Act effectively bans constitutionally protected speech among adults, would not substantially further the govern-

ment's stated interest in shielding minors from indecent online speech, and is not the least restrictive means available to serve the government's interest.

1. *Impossibility and infeasibility of compliance.* The district court received extensive evidence from numerous experts and other witnesses, and carefully considered the different methods of communication over the Internet. Based on this body of evidence, the court made its general factual finding that "[o]nce a provider posts content on the Internet, it is available to all other Internet users worldwide." J.S. App. 47a. For most methods of communication over the Internet, the court concluded that it simply *is not possible* for a speaker to restrict the availability of his or her speech to adults.

For example, the district court specifically considered the ability of a speaker posting a message to a USENET newsgroup to comply with the CDA. The court found that messages on newsgroups are "disseminated using ad hoc, peer to peer connections between approximately 200,000 computers (called USENET 'servers') around the world," J.S. App. 23a, and that the "dissemination of messages to USENET servers around the world is an automated process that does not require direct human intervention or review," *id.* at 23a-24a. Because of this structure, the court found as a fact that "once a user posts a message to a newsgroup . . . , that message becomes available to all subscribers to that newsgroup or bulletin board." *Id.* at 47a. As the court below found, content posted to newsgroups is "available not just in Philadelphia, but also in Provo and Prague." *Id.* at 48a. The court specifically further found that "individuals posting a message to a newsgroup . . . *cannot ensure that all readers are adults.*" *Id.* at 50a (emphasis added) (noting that even the government's expert agreed with that factual conclusion).

The district court reached the same conclusions about e-mail, mail exploders (also known as listservs), chat

rooms, and MUDs and MUSEs. The court found as a fact that there is "no effective way to determine the identity or age of a user who is accessing material through e-mail, mail exploders, newsgroups, or chat rooms." J.S. App. 49a. With regard to mail exploders, the district court specifically noted that even the government's expert witness "agreed that no current technology could give a speaker assurance that only adults were listed in a particular mail exploder's mailing list." *Id.* at 50a. As with newsgroups and mail exploders, the court based its finding that individuals "engaging in chat room discussions cannot ensure that all readers are adults" in part on the fact that the government's expert agreed. *Id.* Similarly, with MUDs and MUSEs, the court found as a fact that "participants . . . do not know whether the other participants are adults or minors." *Id.* at 51a.

With respect to the World Wide Web (which is one method of communication on the Internet), the court found that "[u]nlike other forms of communication on the Internet," J.S. App. 51a, there does exist "technology by which an operator of a World Wide Web server may interrogate a user of a Web site" using a computer program called a "cgi script," *id.* The court found as a fact, however, that content providers who publish on the World Wide Web via the large commercial online services cannot use cgi scripts. *Id.* For those speakers on the Web, there "is no method currently available . . . to screen recipients online for age." *Id.*

The court concluded that *all* of the "defenses" advanced by the government below "are effectively unavailable for non-commercial, not-for-profit entities," J.S. App. 61a, and these entities constitute the majority of speakers on the Internet. *See id.* at 43a-44a. For example, the district court found, as a fact, that "credit card verification is effectively unavailable to a substantial number of Internet content providers as a potential defense to the CDA." *Id.* at 54a. The district court similarly consid-

ered the "adult verification" defense and found as a fact that the "burdens imposed by credit card verification and adult password verification systems make them effectively unavailable to a substantial number of Internet content providers." *Id.* at 56a. Finally, the district court found as a fact that the government's "tagging" proposal would not allow a *speaker* to ensure that a listener is not a minor. *Id.* at 57a-58a.

Chief Judge Sloviter summarized the court's factual conclusions as follows:

> we have found that no technology exists which allows those posting [protected but indecent material] on the category of newsgroups, mail exploders or chat rooms to screen for age. Speakers using those forms of communication cannot control who receives the communication, and in most instances are not aware of the identity of the recipients. If it is not feasible for speakers who communicate via these forms of communication to conduct age screening, they would have to reduce the level of communication to that which is appropriate for children in order to be protected under the statute. This would effect a complete ban even for adults of some expression, albeit "indecent," to which they are constitutionally entitled . . . .
>
> Even as to content providers in the other broad category, such as the World Wide Web, where efforts at age verification are technically feasible through the use of Common Gateway Interface (cgi) scripts . . . , the Findings of Fact show that as a practical matter, non-commercial organizations and even many commercial organizations using the Web would find it prohibitively expensive and burdensome to engage in the methods of age verification proposed by the government, and that even if they could attempt to age verify, there is little assurance that they could successfully filter out minors.

J.S. App. 74a. In their Findings of Fact, the three judges below found as facts that:

> Many speakers who display arguably indecent content on the Internet must choose between silence and the risk of prosecution. *The CDA's defenses*—credit card verification, adult access codes, and adult personal identification numbers—*are effectively unavailable for non-commercial, not-for-profit entities.*

J.S. App. 61a (emphasis added).

2. *Ineffectiveness of the CDA.* The district court also made specific factual findings demonstrating that, because a substantial percentage of all of the indecent or patently offensive speech that is available on the Internet is posted abroad, the CDA *will not be effective* in its claimed goal of preventing children from accessing that material. The court found that a "large percentage, perhaps 40% or more," of content on the Internet "originates outside of the United States," J.S. App. 59a, and some of that foreign speech is sexually explicit, *id.* As the court found, "[f]oreign content is otherwise indistinguishable from domestic content (as long as it is in English), since foreign speech is created, named, and posted in the same manner as domestic speech." *Id.* Minors would have unfettered access to all indecent or patently offensive speech posted abroad, and thus, as Judge Dalzell concluded, "the CDA will almost certainly fail to accomplish the Government's interest in shielding children from pornography on the Internet." *Id.* at 145a.

3. *Availability of user software to block or screen material on the Internet.* Finally, the government's Jurisdictional Statement entirely omits any mention of the extensive factual findings of the district court concerning the variety of methods by which parents can easily and inexpensively prevent their children from accessing indecent or patently offensive online content *even* if posted overseas.[6] The court identified many different and cur-

[6] Thus, user based blocking is far *more* effective than the speaker based blocking required by the CDA, because only user based blocking will prevent minors from accessing the substantial percentage

rently available software programs that allow parents to limit the Internet access of their children. J.S. App. 35a-41a. Similarly, the court found that the major online services all offer extensive options to allow parents to control what their children can access. *Id.* at 41a-42a.

Given these factual findings, *which the government has not contested*, it is clear that the three-judge district court correctly held that plaintiffs/appellees had demonstrated a likelihood of success on their claim that the challenged provisions of the CDA violate the First Amendment.[7]

ARGUMENT

I. THE DISTRICT COURT'S PRELIMINARY INJUNCTION SHOULD BE AFFIRMED BECAUSE THE GOVERNMENT HAS NOT CONTESTED THE FACTS ON WHICH THAT INJUNCTION IS BASED, AND DOES NOT ASK THE COURT TO OVERRULE THE LONG-ESTABLISHED FIRST AMENDMENT PRINCIPLES ON WHICH THAT INJUNCTION IS BASED.

As noted, the government does not argue that the district court's findings of fact are arbitrary or otherwise erroneous. Nor does the government question the First

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of all indecent speech that is posted abroad. And unlike speaker based blocking, which effectively prohibits *adults* from gaining access to the blocked speech, user based blocking enables parents to gain access to the speech themselves, while denying access to their children.

[7] Two judges also concluded that the CDA is unconstitutionally vague. In particular, Judges Sloviter and Buckwalter agreed that the terms "indecent" and "patently offensive" "in context" are so vague as to violate the First and Fifth Amendments. J.S. App. 80a (Sloviter, J.); 84a-85a (Buckwalter, J.). These judges were clearly correct, notwithstanding this Court's distinguishable decision in *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 116 S.Ct. 2374 (1996); however, because the district court's decision can and should be affirmed on the basis of its First Amendment holding, there is no need for the Court to reach the vagueness issue.

Amendment principles invoked by the district court. Accordingly, the government is simply challenging the application of settled First Amendment principles to undisputed findings of fact.

A. The Government Does Not Question the District Court's Conclusion That the CDA Must Be Subjected to Strict Scrutiny.

The government does not dispute that the district court appropriately subjected the CDA's content-based restrictions to strict scrutiny. *See* Jurisdictional Statement ("J.S.") 15. Its sole argument is that the Act can be upheld under strict scrutiny because the Act "directly and materially" serves a "compelling" government interest in the "least restrictive" way. *Id.*, citing *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). *Accord Turner Broadcasting Sys. v. FCC*, 114 S.Ct. 2445, 2470 (1994).[8] The government relies, as it did below, on its interest in protecting children from "patently offensive" and "indecent" sexually oriented online material. *See* J.S. App. 65a (Sloviter, J.); 143a (Dalzell, J.).

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[8] The government wisely has not resurrected its argument, suggested but not seriously urged below, that an "intermediate scrutiny" standard, drawn from *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), might be appropriate instead. Clearly such a standard is not applicable here where there is no plausible analogy to the spectrum scarcity of broadcast: the Internet's characteristics are the antithesis of the scarcity that underlies the *Pacifica* standard. *See Turner*, 114 S.Ct. at 2457 (refusing to extend *Pacifica* standard to cable television); *Sable*, 492 U.S. at 127-28 (same regarding dial-a-porn services). Nor is the Internet characterized by the pervasiveness and intrusiveness the *Pacifica* Court found noteworthy about broadcast. As the district court found, accessing online content requires several affirmative steps; "[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden." J.S. App. 49a. Moreover, "[a]lmost all sexually explicit images are preceded by warnings as to the content." *Id.* Thus, as the government's witness admitted, "the 'odds are slim' that a user would come across a sexually explicit site by accident." *Id.*

But the government also invents a *new* interest, never advanced below—"furthering the First Amendment interests of all parents and children in using what has become an unparalleled tool for communicating and retrieving information." J.S. 16.[9] Without citation to the record, the government now asserts (as if it were a matter of fact) that unless "patently offensive" and "indecent" material is suppressed at the speaker end, "many parents will be deterred from permitting their children to use the Internet; indeed, many parents will be deterred from bringing the Internet into their homes at all." *Id.* The government introduced *no* evidence to support these assertions of fact. And, not surprisingly, the district court was not asked to, and did not, make any such findings.[10] Thus, *nothing* in the record supports the assertion that the Act directly and substantially furthers this newly coined interest.[11]

In any event, it makes little difference what interest the government now asserts in attempting to justify the Act's ban on protected speech. The district court correctly concluded that the Act cannot survive the strict scrutiny to which it must be subjected.

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[9] In the context of strict scrutiny, the Court should consider only the precise interests the government identified and urged below as the justification for the law; it should not credit new interests advanced only on appeal and as to which the court below had no opportunity to take evidence or pass upon. In any event, the government cites no legal support, and there is none, for the proposition that assisting parents or children to use the Internet is a "compelling" government interest.

[10] Indeed, as the government itself notes, J.S. 6-7, the evidence shows that the number of minors gaining access to the Internet is rapidly increasing. And to the extent parents *are* concerned about their children's access to inappropriate materials, the district court found that user based technological tools are available to assist them in imposing restrictions. J.S. App. 42a.

[11] *See* note 18, *infra*, and accompanying text.

B. The District Court Correctly Concluded That Appellees Had Established a Likelihood of Success on Their Claim That the Challenged CDA Provisions Are Facially Unconstitutional.

Although the government now attempts to separate out and defend individually the three substantive provisions of the CDA preliminarily enjoined by the district court, this is *not* how the case was argued and tried below. To the contrary, the government made *no* attempt to distinguish between the three provisions, essentially conceding the same First Amendment analysis applies to all three.[12] The entire focus of the case—from the perspective of not only the court, but the parties as well—was the feasibility of the CDA's defenses and the Act's patent overbreadth. To the extent any one provision received attention, it was the "display" provision, 47 U.S.C. § 223(d)(1)(B). That provision criminalizes the online display of patently offensive material "in a manner available" to minors. The vast majority of the speech criminalized by the CDA, perhaps 99% of the speech at issue in this litigation, is criminalized by that provision. That provision unquestionably violates the First Amendment, as both the three-judge court below and the *Shea* court unanimously held.[13]

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[12] Below, the government's only specific argument regarding 47 U.S.C. § 223(a) was relegated to a footnote: "The specific basis for plaintiffs' challenge to section 223(a) is unclear. In the absence of a specific showing as to how this provision is applicable and might be in violation of the Constitution, it should not be enjoined." Defendant's Opposition to Plaintiffs' Motion for a Temporary Restraining Order (Feb. 14, 1996) at 13 n.8. The government made no specific arguments below regarding 47 U.S.C. § 223(d)(1)(A), and otherwise referred to 47 U.S.C. §§ 223(a) and 223(d) together throughout its papers.

[13] The government tacitly acknowledges the weakness of its argument that Section 223(d)(1)(B) can survive strict scrutiny when it states that the constitutional issues posed by that provision are "more difficult" than those posed by Sections 223(a) and 223(d)(1)(A). J.S. 14.

1. *The Display Provision Imposes a Criminal Ban on Constitutionally Protected Speech Contrary to Well-settled First Amendment Precedent.*

As the government essentially concedes, the challenged provisions of the CDA are clearly unconstitutional *unless* the Act's defenses effectively enable online speakers to communicate indecent or patently offensive speech to adults. *See* J.S. 16-17. That is so because this Court has repeatedly held that government may not ban indecent speech between adults in order to advance its interest in protecting minors from that speech. To the contrary, "government may not 'reduce the adult population . . . to . . . only what is fit for children.'"[14] "The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox," and this is so "*regardless* of the strength of the government's interest" in protecting children. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74-75 (1983) (emphasis added). Government may not constitutionally "quarantin[e] the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence . . . . Surely this is to burn the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). In *Sable*, the Court cited *Butler* to "reiterate" that point, and stressed that a federal statute is unconstitutional if it has the "*effect* of limiting the content of adult [communications] to that which is suitable for children . . . ." 492 U.S. at 131 (emphasis added).[15] *See also Denver Area*

[14] *Sable Communications v. FCC*, 492 U.S. at 128 (quoting from *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 73 (1983), which in turn quoted from *Butler v. Michigan*, 352 U.S. 380, 383 (1957)).

[15] Thus, this bedrock principle has already been applied in the context of sale or distribution of immoral books and other printed materials (*Butler*), use of the postal service to mail unsolicited commercial advertisements about contraceptives to homes (*Bolger*), and use of the telephone to sell sexually explicit communications (*Sable*).

Educ. Telecomm. Consortium v. FCC, 116 S.Ct. 2374, 2393 (1996) (noting that "[n]o provision, we concede, short of an absolute ban, can offer certain protection against assault by a determined child," and affirming that the Court has "not, however, generally allowed this fact alone to justify reduc[ing] the adult population . . . to . . . only what is fit for children.") (internal quotations omitted); *id.* at 2416-17 (Kennedy & Ginsburg, J.J., concurring in part and dissenting in part) (same).

For this reason, the government's entire case hinges on the availability of the Act's defenses. But as the district court unanimously concluded, based on its extensive findings of fact, *which the government has not contested*, the defenses simply are not available to the vast majority of online speakers. As a result, the Act does effect a ban on constitutionally protected speech between adults. The government's arguments to the contrary are based on factual assertions that find no support in the record.

a. First, the government argues that the Act's credit card and adult ID defense is available to the small subset of online speakers who charge for access to their Web sites—so-called "commercial" providers. J.S. 22. The government introduced limited evidence that certain commercial "pornographers" already use credit cards or adult ID verification systems. But, as Judge Dalzell explained, these providers will be largely unaffected by the Act precisely because they already require credit cards to obtain access to virtually all of their posted content. Even if the Act were struck down, commercial pornographers would continue to require credit cards, as they did before the CDA was enacted, because they do not want to provide their speech for free. To the extent they offer advertising "teasers" free of charge, the Act would require them to charge for those images as well, but the Act's vast burden on protected speech cannot be upheld based on this minuscule subset of applications in which the credit card defense could arguably be invoked. *See* J.S. App. 135a

(Dalzell, J.). Far from advancing the government's interest "in a direct and material way," *Turner*, 114 S.Ct. at 2470, such narrow application "provides only the most limited incremental support for the interest asserted." *Bolger*, 463 U.S. at 73.[16]

The government's suggestion that the district court should have rewritten Section 223(d)(1)(B) so that it would apply only to these "commercial pornographers," *see* J.S. 26, contradicts the statutory text and clearly expressed congressional intent. As Judge Sloviter concluded below, "[i]t is clear from the face of the CDA and from its legislative history that Congress did not intend to limit its application to commercial purveyors of pornography." J.S. App. 75a. *Accord Shea*, 930 F. Supp. at 949-50. Unlike the dial-a-porn restrictions upon which the CDA is purportedly modeled, the CDA is *not* by its terms limited to "commercial" speakers. And the Conference Report confirms that Congress intended "content regulation of both commercial and non-commercial providers." H.R. Conf. Rep. No. 458 at 191 (1996). Indeed, the Act is expressly made applicable to "libraries and educational institutions." 47 U.S.C. § 230(e)(2). And Senator Exon, the main sponsor of the Act, referred to newsgroups (which contain primarily non-commercial speech) as the principal target of the legislation. *See* 141 Cong. Rec. S8089 (daily ed. June 9, 1995). The district court thus correctly declined to perform the "radical surgery" on the CDA the government suggests.

Further, the government ignores the district court's factual finding that the credit card defense "would impose

[16] If, as the government has suggested, the CDA was principally aimed at commercial providers of online "pornography," Congress could have passed a statute aimed specifically at that activity. *Cf. Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 645-46 (1985) (government may not enact a broad prophylactic rule "simply to spare itself the trouble" of distinguishing speech that is the subject of legitimate regulatory concern from speech that is not).

a significant economic cost on non-commercial entities." J.S. App. 54a. Forcing speakers to require credit card verification before providing access to their speech would cause many speakers, including many appellees, to "shut down" their Web sites. *Id.* Credit card verification, the court found, also "would significantly delay the retrieval of information on the Internet," which, as the government's expert acknowledged, would deter many listeners from seeking access at all. *Id.* And it "would completely bar adults who do not have a credit card and lack the resources to obtain one from accessing any blocked material." *Id.* Based on the evidence, the court concluded that "[a]t this time, credit card verification is effectively unavailable to a substantial number of Internet content providers as a potential defense to the CDA." *Id. The government has not challenged these critical findings.*

b. Ignoring the district court's express findings to the contrary, the government contends that non-commercial Web sites can take advantage of the Act's defenses, and complains that the court did not adequately discuss the availability of "adult verification services," such as "AdultCheck." J.S. 23. The reason is simple. The government offered "very limited evidence" regarding age verification systems, and even that limited evidence "was not based on personal knowledge." J.S. App. 55a. There was no evidence as to how many persons are registered with such systems, or how reliable they are in screening by age. *Id.* There *was* evidence, however, that adult verification systems are used, to the extent they are used at all, only "for accessing commercial pornographic sites [which] charge users for their services." *Id.* Appellees and their potential listeners obviously would not want to be associated with verification systems that are used primarily, if not exclusively, to access "pornographic" sites. *See Denver Area*, 116 S.Ct. at 2391 ("written notice" requirement will restrict cable viewing by subscribers who "fear for their reputations" if it were disclosed they view "patently offensive" material). There are no such verifi-

cation systems for the vast majority of speech on the Internet, including the speech of the appellees in these consolidated cases. The government's contention now that such systems may be available as a defense for commercial speakers who are not "pornographers," and for the huge number of non-commercial speakers, is thus entirely unsupported by the record.

To the contrary, the district court found as fact that "[i]t would not be feasible for many non-commercial organizations to design their own adult access code screening systems because the administrative burden of creating and maintaining a screening system and the ongoing costs involved is beyond their reach." J.S. App. 55a. Indeed, even some "commercial" entities could not afford to do so. *Id.* Moreover, there was evidence that some Web users would not retrieve information requiring credit cards or adult IDs. *Id.* Most importantly, as the court found, "the [g]overnment presented no testimony as to how such systems could ensure that the user of the password or credit card is in fact over 18." *Id.* at 56a. The government has not directly challenged, and has certainly offered no basis for overturning, the district court's factual finding that "[t]he burdens imposed by credit card verification and adult password verification systems make them effectively unavailable to a substantial number of Internet content providers." *Id.*

c. Finally, with not a single citation to the record or to the district court's findings, the government baldly contends that mail exploder, chat room and newsgroup users who want to disseminate patently offensive material to adults can comply with the Act. J.S. 23-25. This contention is fatally undermined by the district court's factual findings. The court concluded, based on the record evidence, that "[t]here is no effective way to determine the identity or the age of a user who is accessing material through e-mail, mail exploders, newsgroups or chat rooms." J.S. App. 49a. Indeed, as the district court

noted, *the government's own expert agreed with those findings. Id.* at 50a.

Despite its current speculation, in the district court "[t]he government offered *no* evidence that there is a reliable way to ensure that recipients and participants in such fora can be screened for age." *Id.* (emphasis added). It is thus not surprising that the government ultimately concedes that users of mail exploders, newsgroups, and chat rooms who want to disseminate their constitutionally protected speech will be forced by the CDA to "switch to an alternative method of communicating that material, over the Internet or otherwise." J.S. 24. But requiring speakers to switch to an alternative method is patently unconstitutional, particularly since there is no realistic alternative, in terms of cost or audience reach, to communication over the Internet. The government can no more single out a mode of Internet communication for special bans (or burdens) than it can single out one mode of the press. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231-32 (1987). And, in any event, the fact that speech can occur elsewhere cannot justify a content-based restriction. *Southeastern Promotions v. Conrad*, 420 U.S. 546, 556 (1975); *Schneider v. State*, 308 U.S. 147, 163 (1939).

Even more offensive to the First Amendment, the government suggests that "users of all three forms of communication always have the option to tone down their communication so that it does not contain material" criminalized by the Act. J.S. 24. In other words, they can self-censor their speech in order to avoid federal prosecution. There could be no clearer admission that the CDA's "display" provision imposes a ban on the dissemination of constitutionally protected speech.

2. *All Three Challenged Provisions Fail Strict Scrutiny Because They Do Not Directly and Substantially Advance Any Compelling Government Interest.*

In any event, even if the majority of Internet speakers *could* utilize the CDA's defenses, and they cannot, the Act would still fail strict scrutiny for the independent reason—not addressed by the government here—that because of the global nature of the Internet, the Act cannot and will not directly and substantially further the government's stated interest. The district court found as fact that "[a] large percentage, perhaps 40% or more, of content on the Internet originates outside the United States." J.S. App. 59a; *accord Shea*, 930 F. Supp. at 931. The government conceded below that some of the speech posted abroad would violate the CDA, J.S. App. 59a, and it is likely that at least 40% of all speech criminalized by the Act originates outside the United States.[17]

Moreover, the subset of indecent and patently offensive speech the government found most troubling (and asserted is the focus of the CDA)—namely, sexually oriented visual images—is generic and largely fungible. Its country of origin is irrelevant. From the perspective of its potential interest to and/or effect on minors, a photo of a nude woman posted in Denmark is no different from a photo of a nude woman posted in the United States. And both are equally available to every American home connected to the Internet. As the district court concluded, "[p]ornography from, say, Amsterdam will be no less appealing to a child on the Internet than pornography from New York City." J.S. App. 145a (Dalzell, J.). Because foreign speakers will have little or no incentive to comply with the Act, "the CDA will almost certainly fail to accomplish the Government's interest in shielding chil-

[17] There was no evidence that the amount of indecent and patently offensive speech, as a percentage of the whole, varies depending on its country of origin.

dren from pornography on the Internet." *Id. See also Shea*, 930 F. Supp. at 941 (concluding that the CDA "will not reach a significant percentage of the sexually explicit material currently available").[18]

In fact, if the Act were upheld, thus criminalizing domestic speech, that would simply "encourage American pornographers to relocate in foreign countries or at least use anonymous remailers from foreign servers." J.S. App. 145a n.22 (Dalzell, J.).

Under strict scrutiny (and even under intermediate scrutiny), the government must demonstrate that the Act "will in fact alleviate the[] harms [it is meant to prevent] in a direct and material way." *Turner*, 114 S.Ct. at 2470. The CDA's inability to regulate foreign speakers precludes any such showing. *See, e.g., Denver Area*, 116 S.Ct. at 2416 ("Partial service of a compelling interest is not narrow tailoring.") (Kennedy & Ginsburg, J.J., concurring in part and dissenting in part); *Florida Star v. B.J.F.*, 491 U.S. 524, 540-41 (1989) (holding that Florida law prohibiting disclosure of rape victims' names in "any instrument of mass communication" but not by other means did not directly and substantially further the law's stated purpose); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 104-05 (1979) (invalidating law making it a crime for newspapers, but not electronic media, to publish the names of juvenile offenders); *see also Bolger*, 463 U.S. at 73 (restriction that "provides only the most limited incremental support for the interest asserted" cannot pass muster under commercial speech standards). As Justice Scalia explained in *Florida Star*, "a law cannot be regarded as . . . justifying a restriction upon truthful speech,

[18] For the same reason, the CDA will not directly and substantially further the government's newly found interest in expanding access to the Internet. Because foreign "patently offensive" and "indecent" online material will remain available to their children, parents (under the government's theory) will continue to be deterred from permitting their children to use the Internet.

when it leaves appreciable damage to th[e government's] supposedly vital interest unprohibited." 491 U.S. at 541-42 (Scalia, J., concurring).

This fundamental shortcoming of the Act exists regardless of whether the online communication is specifically and intentionally directed to minors or is simply displayed in a manner available to them; in either event, the CDA will not shield minors from foreign-originating material. The Act's ineffectiveness is therefore a separate and independent reason for affirming the district court's preliminary injunction as to all three of the CDA's substantive restrictions, regardless of how broadly or narrowly they are construed. *See* pp. 24-26, *infra*.

3. *The Act Fails Strict Scrutiny Because There Are Less Restrictive Means to Achieve the Government's Stated Goals.*

Underlying the government's argument is a single premise—that without the Act, minors would be left "wholly unprotected." J.S. 27. *See also id.* at 24 (arguing that there is "no other effective way to vindicate the government's compelling interests"). But that premise is simply not true. Indeed, it is completely undermined by the district court's findings of fact, based largely on government stipulations.

The district court concluded that "market forces exist to limit the availability of material on-line that parents consider inappropriate for their children." J.S. App. 32a n.12. The district court made extensive factual findings regarding the availability of "software that is intended to enable parents and other adults to limit the Internet access of children." *Id.* at 35a. The court noted that "[t]he market for this type of software is growing, and there is increasing competition among software providers to provide products." *Id.* The court went on to make specific findings regarding two such products: Cyber Patrol and SurfWatch. *Id.* at 35a-41a. The court also found

that all of the major commercial Internet access providers —America Online (AOL), Microsoft Network, CompuServe and Prodigy—"offer parental control options free of charge to their members," and made specific findings regarding those parental control mechanisms. *Id.* at 41a-42a. Each of these findings was based on facts *stipulated* by the government.

The court also discussed PICS (the "Platform for Internet Content Selection"), which has developed "technical standards that would support parents' ability to filter and screen material that their children see on the Web." *Id.* at 33a. PICS provides the ability for third parties, as well as individual content providers, to rate material. Parents can then screen their children's Internet access based on the rating system they choose. Indeed, they can screen out *all* speech that has not been affirmatively identified as appropriate for children by a rating bureau the parents trust. *Id.* These findings too were stipulated by the government.

Based on these stipulated facts and the additional evidence it heard at trial, the court concluded that "currently available user-based software suggests that a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be widely available." J.S. App. 42a.

As Judge Dalzell explained, these software tools afford parents options to protect their children from online material they deem inappropriate. J.S. App. 146a. But even without such software, "parents can supervise their children's use of the Internet or deny their children the opportunity to participate in the medium until they reach an appropriate age." *Id.* The government can support parents by educating the public about the "benefits and dangers of this new medium." *Id. See Denver Area*, 116 S.Ct. at 2393 (concluding that "informational requirements" together with support for user based blocking is a more narrowly tailored means of limiting minors' access

to patently offensive material on cable than is speaker based blocking).

In other sections of the CDA, Congress determined that user based blocking mechanisms are the most appropriate means of regulating content, including indecency, on broadcast television. In Section 551 of the Act, Congress directed television manufacturers to equip their products "with a feature designed to enable viewers to block display of all programs with a common rating"—the so-called "V-chip." Sec. 551(c). Congress then encouraged the broadcast industry to develop a rating system, Sec. 551(b), and expressly stated federal policy to encourage the establishment of a "technology fund" to support the development of user-based blocking technology and public education, Sec. 552. The fact that Congress has chosen these significantly less restrictive means to protect minors from indecent material in broadcast television further supports the district court's holding that the Act is not narrowly tailored. *See Denver Area*, 116 S.Ct. at 2392 (unexplained decision to use "significantly less restrictive" means to shield minors from "patently offensive" material on regular cable channels demonstrated that restrictions applicable to leased channels is neither the "least restrictive alternative" nor "narrowly tailored").

C. The Non-Display Provisions of the CDA Preliminarily Enjoined by the District Court May Pose Different Questions If They Are Construed As the Government Now Apparently Construes Them on Appeal.

The government did *not* argue below that Sections 223(a)(1)(B) and 223(d)(1)(A) only criminalize the transmission of "indecent" or "patently offensive material" when the speaker *knows* that the *only* recipient of the communication is under 18 years of age. The government now contends, for the first time, that Section 223(a)(1)(B) "applies *only* in situations in which a person transmits indecent material to another person, knowing *that person* is under 18." J.S. 20 (emphasis added). If we understand the government correctly, it is now interpreting Section 223(a)(1)(B) to apply only when the *only* recipient of a communication is known to be a minor.[19]

Below, all parties assumed that Section 223(a)(1)(B) could, and would, be interpreted to criminalize any indecent communications using a telecommunications device when the speaker, knew, or had reason to believe, that *any* recipient of the communication would be a minor. Since every content provider on the World Wide Web, for example, knows—in the sense of being virtually certain—that some recipient of the message will be a minor, Section 223(a)(1)(B) creates the same constitutional problems (barring speech between adults in order to shield minors from the same speech) as the display provision. Accordingly, it is not surprising that the district court applied the same First Amendment analysis to the non-display provisions, and unanimously concluded that the "[p]laintiffs have established a reasonable probability of eventual success in the litigation by demonstrating that §§ 223(a)(1)(B) and 223(a)(2) of the CDA are unconstitutional on their face to the extent that they reach indecency." J.S. App. 62a. Although the government now asserts that the display provision and the other provisions "require[] separate analysis," J.S. 19, it did *not* urge any separate analysis below. *See* note 12, *supra*. Based on the arguments that *were* made to the district court, its conclusion regarding § 223(a) was clearly correct.

The government also now, for the first time, interprets Section 223(d)(1)(A) as applying only to "situations in which a person sends indecent material to someone he knows to be under 18." J.S. 21. It is not at all clear that this is a tenable interpretation of Section 223(d)(1)(A),

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[19] Of course, even under this interpretation, the provision could still senselessly, and indeed unconstitutionally, outlaw a college professor's communications concerning *Lady Chatterly's Lover* or *Moll Flanders*, for example, to a student known to be under 18.

which, unlike Section 223(a)(1)(B), does not expressly impose a scienter requirement regarding age. If we understand the government correctly, however, it is now interpreting Section 223(d)(1)(A) to apply to a communication with specific persons where the speaker knows that the *only* persons receiving the message are minors.

Below, all parties assumed that Section 223(d)(1)(A) could, and would, be interpreted to reach any "patently offensive" communication knowingly made using an interactive computer service where the speaker sent the message to specific persons—such as by e-mail or mail exploders—as opposed to methods of online communication in which the speaker merely makes his speech available to anyone who wants to access it, such as through the World Wide Web. Under this interpretation, Section 223(d)(1)(A) imposes virtually the same restrictions on adult-to-adult communications as does the display provision, and presents the same constitutional problems. Not surprisingly, the district court unanimously concluded that "Sections 223(d)(1) and 223(d)(2) of the CDA are unconstitutional on their face." J.S. App. 62a. Based on the arguments made to the district court, this conclusion was clearly correct.

In summary, the display provision clearly violates the First Amendment because it bans "patently offensive" but constitutionally protected speech between adults. As understood and argued below, the other provisions suffer from the same infirmity. If the government is now definitively and officially construing those other provisions to apply only when the speaker knows that the *only* recipients of the speech are minors, this Court should not itself undertake to review, *ab initio*, the constitutionality of these newly coined provisions. Instead, it should allow the district court to reassess those provisions on remand in light of the government's new position.

CONCLUSION

Although the judgment below was plainly correct, and would warrant summary affirmance, because this is a case of first impression involving application of First Amendment principles to an important new medium of communication, appellees do not oppose the government's request for plenary review.

Respectfully submitted,

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October 1996

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No. 96-511

Supreme Court, U.S.
FILED
OCT 31 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JANET RENO, *et al.*,

Appellants,

—v.—

AMERICAN CIVIL LIBERTIES UNION, *et al.*,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Should this Court summarily affirm the three-judge court's grant of a preliminary injunction against the criminal provisions of the Communications Decency Act on First Amendment grounds, based upon undisputed factual findings establishing that it is technologically and economically infeasible to comply with the Act's provisions, and that the Act would unconstitutionally and ineffectively ban a wide variety of protected speech in the democratic, noninvasive and global medium of cyberspace?

LIST OF PARTIES

Appellees agree with the List of Parties in the Jurisdictional Statement, with the addition of the parent corporation for plaintiff Institute for Global Communications, which is The Tides Center.

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Legislative History

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2d Sess. 113 (1996) 24

Other Authorities

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Pursuant to Rule 18.6 of the Rules of the Supreme Court, appellees American Civil Liberties Union, *et al.*, respectfully move for summary affirmance of the preliminary injunction order entered by the three-judge district court on June 12, 1996.

INTRODUCTION

The government appeals from a preliminary injunction barring the enforcement of the Communications Decency Act of 1996 (CDA), which is Congress' first attempt to regulate the content of communications in the democratizing, global medium of cyberspace.[1] International computer networks like the Internet represent a revolution in human communication that has been compared by some to the development of the printing press. The Internet allows millions of average citizens around the globe to communicate, publish, and exchange information on a vast array of subjects with a worldwide and virtually limitless audience. The Internet thus embodies the values that underlie the First Amendment by nurturing the robust exchange of ideas and equalizing the distribution of information.

The CDA would stifle this promising new medium. The CDA makes it a crime, punishable by up to two years in prison, for anyone to use online computer communications to transmit or "display in a manner available to minors" any material that is "indecent" or "patently offensive." The three-judge district court correctly enjoined these provisions based on detailed factual findings that are not disputed

[1] The CDA was enacted as Title V of the Telecommunications Act of 1996, Pub.L.No. 104-104, §502, 110 Stat. 56, 133-35. The CDA will be codified at 47 U.S.C. §§223(a) to (h), and it is those cites that appellees will use throughout this brief.

on appeal and that will be described in more detail below.[2] *ACLU v. Reno*, 929 F.Supp. 824 (E.D.Pa. 1996), reproduced as Appendix A of the government's Jurisdictional Statement. Four findings of the lower court, however, are worth particular emphasis.

First, the three-judge court found that the Internet is "the most participatory marketplace of mass speech that . . . the world has yet seen." J.S.App. 141a. The empowering and noninvasive nature of the Internet make it a very different medium than radio or television. Second, use of the Internet is growing exponentially and, in part because of that increased use, the technology that governs the Internet is continuously and rapidly evolving. Third, given the current state of technology, there is no way for the vast majority of Internet users to distinguish between adults and minors in their audience and, even in those parts of the Internet where it might be technologically possible, it is economically infeasible for many speakers, including the plaintiffs in this case. For these speakers, the only way to ensure that minors do not have access to speech that might later be deemed "indecent" by a criminal jury is to eliminate such speech from the Internet entirely. Fourth, less restrictive alternatives already exist that empower parents to make private decisions within the family about what materials their children should see. The CDA, conversely, is uniquely ill-suited to shield children from sexually explicit material on the Internet precisely because it is a global communications medium. The record reveals that at least 40% of the speech now on the Internet originates overseas and the general consensus is that this percentage is growing. That speech can be accessed as easily as speech that originates domestically but, as the lower court found, and the government concedes, that speech is beyond the reach of our domestic criminal law.

Based on these findings, the three-judge court reached the unanimous conclusion that the inevitable effect of the CDA would be to deprive adult Internet users of their right to send and receive constitutionally protected speech that deals with sexual issues. Because that result so clearly violates the First Amendment under this Court's well-established jurisprudence, the decision below can and should be summarily affirmed.

[2] A separate challenge to §223(d), filed in the Southern District of New York, also resulted in a preliminary injunction from a three-judge court on July 29, 1996. *Shea v. Reno*, 930 F.Supp 916 (S.D.N.Y. 1996). The government has suggested that the *Shea* case be held pending the outcome of this case; ACLU appellees agree.

STATEMENT OF THE CASE

This case involves the government's attempt to regulate a new technology that will serve as the basis for global communication in the twenty-first century. Unfortunately, Congress held no hearings about the nature of the Internet before it enacted the CDA. The sad but predictable result is that Congress drafted a statute that is both ineffective and unconstitutional, as the lower court found after engaging in the detailed factual inquiry that Congress chose not to do.

A. The Statutory Framework

The criminal provisions challenged in this action are embodied in two sections of the CDA. Section 223(a)(1)(B) applies to "telecommunications devices," a term that is nowhere defined in the Act but that the parties have agreed includes a modem. J.S.App. 6a-7a n.5. Under §223(a)(1)(B), anyone who transmits an "indecent" communication, "knowing that the recipient of the communication is under 18 years of age," now faces felony charges. The term "inde-

cent" is also undefined in the statute.[3]

Section 223(d)(1) applies to "interactive computer services," a phrase that is defined in the CDA. *See* 47 U.S.C. §230(e)(2). In contrast to the indecency provision, this section of the statute makes it a crime to "send" or "display in a manner available" to any person under eighteen any communication that, "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."[4]

Throughout the district court proceedings, the government made very little effort to defend the constitutionality of these criminal provisions, standing alone. Instead, the government's constitutional defense primarily relied on the so-called "safe harbor" provisions set forth in §223(e)(5) of the Act. Section 223(e)(5)(A) creates an affirmative defense for anyone who "has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to [prohibited] communications . . . ." Section 223(e)(5)(B) creates an affirmative defense for anyone who "has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number." At trial, much of the evidence concerned the meaning, scope, and practical impact of these so-called defenses.

B. The Plaintiffs

The ACLU plaintiffs represent a wide variety of online users, content providers, and service providers. The subject matter of plaintiffs' speech ranges from human rights, censorship, and pornography, to the discussion of lesbian and gay issues, safer sex, and rape in prison.[5] The ALA plaintiffs also include a wide variety of speakers, including the American Library Association, trade groups such as the American Publishers Association, and service providers such as America Online, Microsoft, Compuserve and Prodigy. None of the plaintiffs are pornographers, as that term is commonly understood, but all of them provide online speech that is sexually oriented or contains vulgar words. J.S.App. 61a, ¶123. Many of the ACLU plaintiffs are individuals or nonprofit organizations with limited budgets; some rely heavily on volunteer labor.[6] Many also believe that the information and ideas they convey online about sexual issues are valuable, not harmful, for older minors.[7]

For example, plaintiff Critical Path AIDS Project, Inc. (Critical Path) maintains a web site that offers a wide variety of information about AIDS and safer sex. Kiyoshi Kuromiya, Director of Critical Path, testified:

> Because most cases of AIDS are transmitted through sexual contact, the information must deal with descriptions of risky sexual activity.

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[3] Section 223(a)(1)(B) also prohibits the transmission of "obscene" communications. That prohibition has not been challenged in this case.

[4] Plaintiffs also challenged §§223(a)(2) and (d)(2), which make it a crime to "knowingly permit" use of a telecommunications facility for expression prohibited by §§223(a)(1)(B) or 223(d)(1).

[5] For a fuller description of the plaintiffs, *see* The Parties' Stipulations in Preparation for the Preliminary Injunction Hearing, at ¶¶70-356, adopted as findings of the trial court, J.S.App. 12a n.9. Those paragraphs are reproduced in the Appendix to this motion. *See also* J.S.App. at 42a-48, ¶¶74-78, 85.

[6] *See* J.S.App. 44a, ¶76.

[7] *Id.* at 71a (Sloviter, C.J.)("[P]laintiffs presented testimony that [their] material . . . may be critically important for certain older minors. For example, there was testimony that one quarter of all new HIV infections in the United States is estimated to occur in young people between the ages of 13 and 20, an estimate the government made no effort to rebut").

> In order to ensure that readers understand the materials, it often must be written using street or colloquial language rather than clinical language in order to be understood by most lay persons . . . . In my view, the information that Critical Path provides saves lives of both teenagers and adults and any attempt to censor or restrict the free flow of this life-saving information would be a critical public health mistake.[8]

Plaintiff Wildcat Press, a publisher of gay and lesbian literature, publishes two electronic magazines on the World Wide Web that are written by and for gay and lesbian youth. Patricia Nell Warren testified that the *YouthArts* e-zines "provide a creative forum for many youth to discuss their coming out, their experiences with gay life and their sense of their own identity . . . . Many of the contributors openly discuss sex and sexuality, often using slang common to their age group." Decl. of Patricia Nell Warren, at 9, ¶¶21, 23.

Plaintiff Stop Prisoner Rape (SPR), a nonprofit organization dedicated to combating the rape of prisoners and providing assistance to survivors, has a web site that contains a variety of textual and graphical documents concerning prisoner rape, including a number of testimonials and excerpts of letters from survivors of prisoner rape. Decl. of Stephen Donaldson. Plaintiff American Civil Liberties Union has a feature on its web site that allows users to access this Court's decision in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), including the transcript of George Carlin's "seven dirty words" monologue that was deemed

[8] Decl. of Kiyoshi Kuromiya, at 3-5, ¶13, ¶15, ¶16. Direct testimony at trial was presented by declaration. J.S.App. 5a.

"indecent" for radio broadcast during daytime hours by the FCC.[9] Other plaintiffs include Human Rights Watch, an international human rights monitoring organization that uses the Internet to distribute reports and to communicate about human rights issues such as "torture, rape, mutilation, execution, and mass murder;"[10] Justice on Campus, which provides an online information clearinghouse on free speech issues on college campuses; and John Troyer, who maintains The Safer Sex Page, a web site with information on safer sex that includes explicit language and pictures, and an online discussion forum in which users can comment on subjects such as condom brands, masturbation, and how to talk about safer sex with a partner.

The government has consistently refused to say that plaintiffs' speech is not covered by the CDA. As the lower court noted, "The Government has not by motion challenged the standing of any plaintiff in either case, and we harbor no doubts of our own on that point." J.S.App. 12a n.9; *see also id.* at 107a (Dalzell, J.).

C. Factual Findings By The Three-Judge District Court

The preliminary injunction proceedings included five days of testimony, documentary evidence, and detailed stipulations. The decision issued by the three-judge court contained over four hundred separate findings of fact that included information about the nature of communication and content in the cyberspace medium, the ability of users to restrict access to unwanted material, and the impracticality of

[9] Decl. of Barry Steinhardt. The ACLU also hosts unmoderated online discussion groups, including a "free speech zone," that allow citizens to discuss and debate a variety of civil liberties issues.

[10] App. at 6a, ¶89.

the statutory defenses. Notably, 334 of the 409 separate fact-findings adopted by the trial court were derived from stipulations the parties filed with the court. J.S.App. 12a-30a, ¶¶1-43; App. ¶¶70-356. Thus, the majority of the facts necessary to the court's holding *were not disputed by the government, and are not disputed on appeal*. J.S.App. 11a-12a.

1. The Nature Of The Medium

The findings of fact established that the online medium is a "unique and wholly new medium of worldwide human communication." *Id.* at 46a, ¶81. The Internet is a giant, global communications network that connects innumerable smaller computer networks. *Id.* at 12a, ¶1. While difficult to estimate due to rapid growth, the Internet is believed to connect over 9,400,000 host computers worldwide and as many as 40 million people. *Id.* at 13a, ¶3. Indeed, only about 60% of the Internet's host computers are currently located in the United States. *Id.* Thus, the medium allows "literally tens of millions of people . . . to exchange information. These communications can occur almost instantaneously, and can be directed either to specific individuals, to a broader group of people interested in a particular subject, or to the world as a whole." *Id.* at 13a-14a, ¶4.

The court also found that the evidence "showed significant differences between Internet communications and communications received by radio or television." *Id.* at 49a, ¶89. Communications on the Internet do not "'invade' an individual's home or appear on one's computer screen unbidden." *Id.* at ¶88. Rather, the receipt of information on the Internet "requires a series of affirmative steps more deliberate and directed than merely turning a dial." *Id.* at ¶89. The Internet is also distinct because it is "not exclusively, or even primarily, a means of commercial communication." *Id.* at 43a, ¶75. In addition, "[t]he start-up and operating costs

entailed by communication on the Internet are significantly lower than those associated with use of other forms of mass communication." *Id.* at 44a, ¶76.

There are a variety of ways in which users can communicate in cyberspace. *See generally id.* at 21a-25a, ¶¶22-32. Electronic mail, or e-mail, allows an online user to address and transmit a message to one or more people, "comparable in principle to sending a first class letter." *Id.* at 21a, ¶23. In addition, there are a wide variety of online discussion forums that allow groups of users to discuss and debate subjects of interest. The three most common methods for online discussion are mail exploders or "listservs," USENET newsgroups, and chat rooms. "Mail exploders," or "listservs," allow online users to subscribe to mailing lists that discuss particular subjects of interest. Subscribers send an e-mail message to the "list," and the "mail exploder" automatically and simultaneously sends the message to all of the other subscribers on the list; subscribers can reply to the message by sending a response to the list. *Id.* at 22a, ¶24.

The second type of forum for online discussion occurs on "USENET newsgroups . . . [which] are among the most popular and widespread applications of Internet services, and cover all imaginable topics of interest to users." *Id.* at 23a, ¶25. Unlike mail exploders, online users need not "subscribe" to newsgroups in advance in order to participate. Rather, the newsgroups are huge databases of messages arranged according to subject matter, and online users may access or send a message to any newsgroup at any time. *Id.* at 22a-23a, ¶25. There are newsgroups on more than 15,000 different subjects; "[c]ollectively, almost 100,000 new messages (or 'articles') are posted to newsgroups each day." *Id.* at 24a, ¶26.

Third, chat rooms, or "Internet Relay Chats," allow "individuals on the Internet [to] . . . engage in an immediate

dialog, in 'real time,' with other people on the Internet . . . . IRC is analogous to a telephone party line, using a computer and keyboard rather than a telephone." *Id.* at ¶27. There are thousands of different chat rooms available, "in which collectively tens of thousands of users are engaging in conversations on a huge range of subjects." *Id.*

Finally, one of the most well-known methods for communicating information online is the "World Wide Web," which allows users to publish documents, or "web pages," that can then be accessed by any other user in the world. *See generally id.* at 25a-32a, ¶¶33-48. Most web documents contain "links," which are "short sections of text or image which refer to another document." *Id.* at 27a, ¶36. When selected by the user, the "linked" document is automatically displayed, wherever in the world it is actually stored. *Id.* "These links from one computer to another, from one document to another across the Internet, are what unify the web into a single body of knowledge, and what makes the Web unique." *Id.* at 28a, ¶39. Ease of access, the court found, has been the key to the tremendous success of the Web.

In considering the diversity of communication and material available through the online medium, the district court noted that "[i]t is no exaggeration to conclude that the content on the Internet is as diverse as human thought." *Id.* at 42a, ¶73. The diversity of content is possible "because the Internet provides an easy and inexpensive way for a speaker to reach a large audience, potentially of millions." *Id.* at 44a, ¶76. The Internet is thus a "never-ending worldwide conversation," *id.* at 146a (Dalzell, J.), in which users "may speak or listen interchangeably." *Id.* at 46a, ¶79.

2. The Scope Of The CDA's Criminal Prohibitions

In addition to the information described in plaintiffs' declarations, the court found that a wide variety of other

communications with sexual content, or containing vulgar words, would be potentially subject to the CDA. Indeed, the government did not dispute this point: although it attempted to paint the CDA's main target as "pornography," it acknowledged that artistic and political material with serious value could be prosecuted. The government's own witnesses testified that the magazine Vanity Fair, with a nude cover photo of the actress Demi Moore, would be potentially indecent in some communities, Schmidt testimony, Tr. Vol. IV, at 138-39, as would a political discussion that included the sentiment "Fuck the CDA," Olsen testimony, Tr. Vol. V, at 53-53. *See also* J.S.App. 99a (Buckwalter, J.); *id.* at 119a (Dalzell, J.). The court also found that library card catalogues, artworks such Francesco Clemente's "Labyrinth," material from contemporary films such as *Leaving Las Vegas*, and reproductions of ancient Indian sculptures, are all within the CDA's broad proscriptions. *See* J.S.App. 42a-47a, ¶¶74-75, 78, 85; 71a, 76a-77a.

Conversely, while there was no dispute during the preliminary injunction proceedings that some sexually explicit material is available on the Internet, *id.* at 74a, ¶¶82-84, it is not "the primary type of content on this new medium." *Id.* at ¶83. While so-called search engines, used to help computer users find information on the web, "can accidentally retrieve material of a sexual nature through an imprecise search," the court found many factors that decreased the likelihood of such an "accident:"

> A document's title or a description of the document will usually appear before the document itself . . . and in many cases the user will receive detailed information about a site's content before he or she need take the step to access the document. Almost all sexually explicit images are preceded by warnings as to the content. Even the Government's witness, Agent

> Howard Schmidt, Director of the Air Force Office of Special Investigations, testified that the *"odds are slim"* that a user would come across a sexually explicit site by accident.

Id. at ¶88 (emphasis added).

3. The Impracticality Of The Statutory Defenses

After hearing extensive testimony on precisely this issue, the three-judge court found that it is currently impossible for most online speakers to determine who may ultimately read their messages, or to identify and screen out minors from the wide variety of forums over which they may communicate in cyberspace. *See generally id.* 49a-58a, ¶¶90-116. Thus, the court found that "[o]nce a provider posts content on the Internet, it is available to all other Internet users worldwide." *Id.* at 47a, ¶85. Moreover, for the vast areas of cyberspace comprehended by e-mail, mail exploders, newsgroups, and chat rooms, "[t]here is no effective way to determine the identity or the age of a user who is accessing material." *Id.* at 49a, ¶90. The court found that verification of a credit card number over the Internet "is not now technically possible." *Id.* at 53a, ¶97. Off-line credit card verification, in addition to "significantly delay[ing] the retrieval of information on the Internet," *id.* at 54a, ¶101, would impose a significant economic cost on non-commercial entities. For example, Critical Path testified that its web site has been accessed 3,300 times daily. The court concluded that "[i]f Critical Path must pay a fee every time a user initially enters its site, then, to provide free access to its non-commercial site, it would incur a monthly cost far beyond its modest resources." *Id.* at ¶100.

The court acknowledged that the government did offer "very limited evidence" regarding age verification systems on the World Wide Web that are used for accessing "commercial pornography sites"; however, that evidence "was not based on personal knowledge." *Id.* at 55a, ¶103. Moreover, the court found that the burdens imposed by such systems "make them effectively unavailable to a substantial number of Internet content providers." *Id.* at 56a, ¶107. In addition, free and anonymous access to speech on the Internet is often critical, so that requiring payment and proof of identity and age will deter substantial numbers of their audience, both adult and minor, from accessing important and even life-saving communications. *Id.* at 61a, ¶121. In sum, the court found that the "defenses" provided by the CDA under 47 U.S.C. §223(e)(5)(B) -- use of verified credit cards, adult access codes, and the like, to screen out minors -- "are effectively unavailable for non-commercial, not-for-profit entities." *Id.* at ¶122.

The court also found that there is no currently available technology to implement a possible "good faith" defense under §223(e)(5)(A) of the CDA through self-labeling or "tagging" of possibly "indecent" or "offensive" messages. It thus rejected the government's suggestions that a "consensus among speakers" might soon emerge "to use the same tag to label 'indecent' material," and that the industry might develop computer software "that recognizes the tags and takes appropriate action when it notes tagged speech." *Id.* at 57a-58a, ¶¶113-14. The court found these speculations concerning future technological developments insufficient to sustain a law that criminalizes speech today. *Id.* at 58a, ¶114.

Furthermore, the court found, the task of determining which material to tag indecent "would be extremely burdensome for organizations that provide large amounts of material." *Id.* at 57a, ¶110. For example, "[t]he Carnegie Library would be required to hire numerous additional employees to review its online files at an extremely high cost to its limited budget." *Id.* Similarly, "it would be impossible for . . . Critical Path to review all of its material because it has only

one full and one part-time employee." *Id.* The inevitable result, as the court found, is that given the current state of technology, "[m]any speakers who display arguably indecent content on the Internet" -- including political and artistic discussion, and "information regarding protection from AIDS, birth control, or prison rape" -- would have to "choose between silence and the risk of prosecution" if the CDA were not preliminarily enjoined. *Id.* at 61a, ¶¶122-123.

4. The Availability Of Less Restrictive Alternatives That Empower Parents To Make Decisions For Their Own Families

Finally, there is undisputed evidence in the trial record about the variety of voluntary measures available to restrict minors' access to online communications that their parents may consider unsuitable for them. *Id.* at 32a-42a, ¶¶49-73. User-based software that blocks content can be tailored to reflect the parents' values and the age and maturity of the child. As the court found, "[t]he market for this type of software is growing, and there is increasing competition among software providers to provide products." *Id.* at 35a, ¶54. In addition, "America Online, Microsoft Network, and Prodigy all offer parental control options free of charge to their members." *Id.* at 41a, ¶69.

D. The Decision Below

Following the court's findings of fact, all three judges agreed that, given the facts about the online medium, plaintiffs had established a likelihood of success on their claim that the challenged CDA provisions violate the First Amendment because they are substantially overbroad and insufficiently tailored to satisfy strict scrutiny.[11]

Chief Judge Sloviter began her opinion by emphasizing that the CDA was *not* simply a regulatory scheme; instead, "we are dealing with criminal provisions, subjecting violators to substantial penalties." *Id.* at 64a. Rejecting the government's reliance on the statutory defenses to narrow the broad reach of the statute, she noted:

> A wealth of persuasive evidence, referred to in detail in the Findings of Fact, proved that it is either technologically impossible or economically prohibitive for many of the plaintiffs to comply with the CDA without seriously impeding their posting of online material which adults have a constitutional right to access.

Id. at 73a (Sloviter, C.J.); *id.* at 84a (Buckwalter, J.); *id.* at 113a (Dalzell, J.).

Judge Dalzell also noted that "the Supreme Court's First Amendment jurisprudence compels us to consider the special qualities" of the cyberspace medium. *Id.* at 872. As Judge Dalzell explained:

> I . . . have no doubt that a Newspaper Decency Act, passed because Congress discovered that young girls had read a front page article in the New York Times on female genital mutilation in Africa, would be unconstitutional . . . . Nor would a Novel Decency Act, adopted after legislators had seen too many pot-boilers in con-

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[11] Although the judges jointly issued findings of fact and conclusions of law, and agreed that the CDA fails strict scrutiny and is unconstitutionally overbroad, each of the three judges issued a separate opinion. Judge Buckwalter and Judge Sloviter also held that the CDA was unconstitutionally vague; Judge Dalzell disagreed.

> venience store book racks, pass constitutional muster . . . . There is no question that a Village Green Decency Act, the fruit of a Senator's overhearing of a ribald conversation between two adolescent boys on a park bench, would be unconstitutional . . . . A Postal Decency Act, passed because of constituent complaints about unsolicited lingerie catalogues, would also be unconstitutional . . . . In these forms of communication, regulations on the basis of decency simply would not survive First Amendment scrutiny.

Id. at 144a. Judge Dalzell further observed that the Internet is an even more "speech-enhancing medium than print, the village green, or the mails." *Id.* Because the CDA "would necessarily reduce the speech available for adults on the medium," it is "constitutionally intolerable." *Id.*

ARGUMENT

The decision below is so clearly correct under well-established law that this Court need not engage in plenary review.[12] All six federal judges that have reviewed the CDA have concluded that it is unconstitutional. The government itself has indicated that the CDA may be unconstitutional absent the statutory defenses.[13] Indeed, the government has come close to conceding that CDA is *at least in part* unconstitutional even with the defenses.[14]

Summary affirmance is particularly appropriate at this stage of the proceedings because the three-judge court's conclusions were driven by extensive, detailed, and largely undisputed factual findings. These facts establish that there is currently no feasible way to identify and screen minors from access to most areas of the Internet. Consequently, the CDA presently operates as a total ban on "indecent" but constitutionally protected speech, a result clearly foreclosed by this Court's decisions in *Butler v. Michigan*, 352 U.S. 380 (1957), and *Sable Communications v. FCC*, 492 U.S. 115 (1989).

Plaintiffs acknowledge that this case is an important one. But summary disposition is appropriate, even in cases of high import, when the decision below is "so obviously correct as to warrant no further review." Stern, Gressman, Shapiro & Geller, SUPREME COURT PRACTICE at 401. In the present case, this Court's decisions in *Butler*, *Sable*, and *Denver Area Educational Area Television Consortium v. FCC* (*DAETC*) , 518 U.S. __, 116 S.Ct. 2374 (1996), establish without question that a statute imposing what amounts to a criminal ban on a broad range of expression that is constitutionally protected for adults flatly violates the First Amendment.

Finally, summary affirmance is appropriate for prudential reasons. This is the first case presented to the Court that directly addresses the application of traditional free speech principles to the rapidly evolving medium of online

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[12] This Court has stated that "[a] summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment." *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.5 (1983); *see generally* Stern, Gressman, Shapiro & Geller, SUPREME COURT PRACTICE 215-221, §§4.28-4.29 (7th ed. 1993).

[13] *Shea*, 930 F.Supp at 941 ("The Government concedes that §223(d), standing alone, is not constitutionally defensible").

[14] *See* J.S. at 14, noting that §223(d)(1)(B) "raises more difficult questions," and arguing for a narrowing construction "[e]ven if one or more of the CDA's restrictions were unconstitutional in some of their applications . . . ."

communications. Only last Term In *DAETC*, Justice Souter cautiously observed that "[i]n my own ignorance I have to accept the real possibility that 'if we had to decide today . . . just what the First Amendment should mean in cyberspace, we would get it fundamentally wrong.'" *Id.* at 2402, quoting Lessig, "The Path of Cyberlaw," 104 Yale L.J. 1743, 1745 (1995); *see also* 116 S.Ct. at 2403 (O'Connor, J., concurring in part and dissenting in part). Appellees respectfully submit that this Court does not "ha[ve] to decide" that issue today. Instead, it can and should focus on the factual record developed below and, based on that record, summarily affirm.

I. GIVEN THE THREE-JUDGE COURT'S EXTENSIVE, LARGELY UNDISPUTED FACTUAL FINDINGS REGARDING THE TECHNOLOGY AND ECONOMICS OF CYBERSPACE, THE DECISION BELOW IS PLAINLY CORRECT

Plaintiffs recognize that summary affirmance of a lower court order preliminarily enjoining a federal statute would be unusual. It is, nonetheless, fully warranted on this record. As the three-judge court found, because there is no way to shield minors alone from online "indecency" in the vast majority of contexts, the CDA amounts to a criminal ban on constitutionally protected communication among adults. This Court has frequently held that a statute that reduces adults to reading and seeing only what is fit for children cannot be sustained under the First Amendment.

Indeed, this Court has *never* upheld a *criminal* ban on indecent speech, even under the guise of protecting children. *See Butler*, 352 U.S. 380 (invalidating a conviction for distribution of indecent publications); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983)(striking down a ban

on mail advertisements for contraceptives because "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox"); *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968)(invalidating ordinance banning sexually explicit motion pictures); *FCC v. Pacifica Foundation*, 438 U.S. at 750 (upholding noncriminal time-channeling rules against indecency in broadcast); *Sable Communications v. FCC*, 492 U.S. at 128 (striking down indecency ban in phone communications); *DAETC v. FCC*, 116 S.Ct. 2374 (striking down two of three indecency regulations for cable television, and upholding permissive regulation that allows, but does not require, broadcasters to ban indecency from leased access channels).

The government cannot persuasively challenge the lower court's findings, and has not attempted to do so. Nor has it asked this Court to reverse any of its well-established First Amendment rules. To the contrary, the government does not quarrel with the legal standard -- strict scrutiny -- used by lower court in this case. J.S. at 15; *see also* J.S. App. 67a. On this record, therefore, the government has failed to present the Court with any substantial constitutional issue to resolve.

Before the three-judge court, the government's effort to avoid the seemingly inescapable conclusion that the CDA is unconstitutional under *Butler* and its progeny rested entirely on its proposition that some of the CDA "safe harbor" defenses might work, at least some of the time, for some cyberspace speakers. The trial court finding that those defenses were not technologically or economically available for the vast majority of online content providers, including most of the plaintiffs, effectively disposes of that argument in this Court. *See generally* pp.12-14, *supra*. Specifically, the lower court found that §223(e)(5)(B)'s credit card and age verification defenses were effectively unavailable for the vast majority of communications and speakers in cyber-

space. As to the "good faith" provision of §223(e)(5)(A), the lower court found that the government's proposal that "tagging" or self-rating might provide a defense is "purely hypothetical and offers no currently operative defense to Internet content providers." *Id.* at 79a (Sloviter, J.).

In addition to the findings establishing the technical infeasibility and economic burden of the defenses, many other factors supported the trial court's conclusion that the CDA is not the least restrictive means of accomplishing the government's asserted compelling interest in protecting the physical and psychological well-being of minors. First, the court held that the global nature of the medium made the CDA an imprecise and ineffective tool for achieving the government's purpose:

> [T]he CDA will almost certainly fail to accomplish the Government's interest in shielding children from pornography on the Internet. Nearly half of Internet communications originate outside the United States, and some percentage of that figure represents pornography. Pornography from, say, Amsterdam will be no less appealing to a child on the Internet than pornography from New York City, and residents of Amsterdam have little incentive to comply with the CDA.

Id. at 882 (Dalzell, J.).

Second, in contrast to the facts establishing the ineffectiveness of the CDA, the preliminary injunction record is replete with evidence of alternative means of accomplishing the government's purpose *more* efficiently and *less* restrictively than through an outright criminal ban -- for example, through parental use of blocking software and the development of additional mechanisms for screening content on a voluntary basis. *See generally* pp.14, *supra*. In addition,

"[t]he Government can continue to protect children from pornography on the Internet through vigorous enforcement of existing laws criminalizing obscenity and child pornography." J.S.App. 145a (Dalzell, J.).

Third, as Judge Sloviter noted, it is unclear on this record that the government has a compelling interest in blocking all minors' access to all online communications that would fit within the CDA's capacious "indecency" and "patent offensiveness" standards. *Id.* at 72a. Judge Sloviter thus questioned whether the government had met its burden of justifying restrictions so broad that it could well become criminal in many communities to permit older teenagers online access to the hit play "Angels in America," news articles on female genital mutilation, or safer sex information. *Id.* at 70a. Under these facts, the CDA clearly fails strict scrutiny, which demands that "the benefit gained [by a content-based restriction] must outweigh the loss of constitutionally protected rights." *Elrod v. Burns*, 427 U.S. 347, 363 (1976).

The Court's ruling last Term in *DAETC* fully supports this conclusion. No Justice in that case questioned the continued vitality of the principles set forth in *Butler* and *Sable*. To the contrary, the Court explicitly followed *Butler* and *Sable* in invalidating the only portion of the 1992 Cable Act[15] which (like the CDA) *mandated* censorship: the requirement in §10(b) of the Act that "indecent" programming on leased access channels be scrambled until subscribers requested unscrambling. Even though the §10(b) restriction was far less draconian than the criminal penalties under the CDA, it was unconstitutional because the government had not met its burden of demonstrating that mandated

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[15] Cable Television Consumer Protection and Competition Act of 1992, 106 Stat. 1486, 47 U.S.C. §532.

scrambling was the least burdensome means available to accomplish its goal of protecting minors. 116 S.Ct. at 2390-2394 (plurality opinion); *id.* at 2396-97 (Kennedy & Ginsburg, JJ., concurring in part and dissenting in part). As Justice Breyer wrote for the plurality:

> No provision, we concede, short of an absolute ban, can offer certain protection against assault by a determined child. We have not, however, generally allowed this fact alone to justify "reduc[ing] the adult population . . . to . . . only what is fit for children."

Id. at 2393, quoting *Sable*, 492 U.S. at 128; *Bolger v. Youngs Drug Products Corp.*, 463 U.S. at 73, and *Butler*, 352 U.S. at 383.

In striking down the mandatory provision, the *DAETC* plurality considered the "benefits [the requirement] is likely to achieve," noting that "where, as here, the record before Congress . . . provides no convincing explanation, this Court has not been willing to stretch the limits of the plausible . . . in order to justify laws that impose significant restrictions upon speech." 116 S.Ct. at 2394. Because of the global nature of the online medium, the CDA is even less effective than the mandatory scrambling provisions of the Cable Act struck down by the Court in *DAETC*, thus warranting summary affirmance of the preliminary injunction in this case.

Of the other Cable Act provisions at issue in the *DAETC* case, the Court invalidated §10(c)(permitting cable operators to forbid indecency on public access channels), and upheld §10(a)(giving operators similar control over leased access programming). Both provisions were permissive; no government *mandate* -- much less a criminalization of protected speech -- was at issue. Even so,

§10(c) failed to satisfy First Amendment standards.[16]

The *DAETC* plurality also reaffirmed the principle that the particular qualities of the medium must be considered in determining the appropriate level of First Amendment protection. Justice Souter wrote, "Our indecency cases since *Pacifica* have likewise turned as much on the context or medium of the speech as on its content." *Id.* at 2401 n.2. In *Sable*, for example, the challenged ban on indecency was struck down in part because it "involved a communications medium, telephone service, that was significantly less likely to expose children to banned material, was less intrusive, and allowed for significantly more control over what comes in the home." *See* 116 S.Ct. at 2388 (Breyer, J.). Even in the cable television context, Justices Thomas, Rehnquist, and Scalia had no doubt in *DAETC* that "under our current jurisprudence, Congress could not impose a total ban on the transmission of indecent programming." *Id.* at 2423, citing *Sable*, 492 U.S. at 127. *A fortiori*, then, certainly the government cannot justify a complete ban in the even less invasive, and more empowering, technology of the Internet. Yet that is exactly what Congress accomplished in the CDA -- a

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[16] Section 10(a) was upheld in large part because the First Amendment interests of cable operators were enhanced by returning to them some measure of editorial control over leased access channels. *DAETC*, 116 S.Ct. at 2385-87. In dissenting from the plurality's striking of §10(b) and §10(c), Justices Thomas, Rehnquist, and Scalia rejected a First Amendment jurisprudence that was less protective of the electronic than of the print media, agreed with Justices Kennedy and Ginsburg that strict scrutiny was appropriate, and only differed with the other Justices as to the relative strengths of the competing free speech interests asserted by cable programmers and cable operators. 116 S.Ct. at 2422, 2429. In the present case, it is difficult to draw lines between speakers and content providers, Internet Service Providers, and listeners on the Internet, since many users engage in several roles simultaneously. More importantly, the CDA does not enhance (or restore) anyone's free speech rights.

criminal ban on speech in the most democratizing and unintrusive medium that the world has yet created.

Thus, the application of clear legal principles to the factual findings regarding the online medium supports summary affirmance in this case.

II. NONE OF THE GOVERNMENT'S OTHER ARGUMENTS JUSTIFY NOTING PROBABLE JURISDICTION AT THIS STAGE OF THE PROCEEDINGS

In its jurisdictional statement, the government fails to raise any legitimate argument *against* summary affirmance. First, as discussed above, the government's argument that the overbreadth of the CDA is not "substantial," J.S. at 21-25, does not comport with the facts.[17]

Second, to cure the obvious overbreadth of the CDA, the government suggests that the trial court should have upheld §223(d)'s display provision to the extent that it applies to "commercial Web sites." J.S. at 26. But the trial court in this case and in the *Shea* case correctly declined to perform such "radical surgery." *Shea*, 930 F.Supp. at 923. As Judge Sloviter wrote: "It is clear from the face of the CDA and from its legislative history that Congress did not intend to limit its application to commercial purveyors of pornography." J.S.App. 75a; *see also* H.R.Rep.No. 458, 104th Cong., 2d Sess. 113, 191 (1996). Among other things, Congress intentionally banned material under the CDA that *lacks* prurient appeal and that *has* serious value. Thus, narrowing the CDA's application to "commercial web sites" would ban

[17] *See generally* pp.12-14, *supra*. *See also* the ALA Plaintiffs' Response to the Government's Jurisdictional Statement for a discussion of the government's misstatement of the factual record.

not only "commercial pornographers" from the Internet, but would criminalize "a broad range of material from contemporary films, plays and books showing or describing sexual activities . . . to controversial art and photographs."[18] J.S.App. at 76a-77a. In addition, given the explicit application of the statute to libraries and educational institutions, the government's suggestion would require more than creative re-drafting. *See* §230(e)(2); §223(f)(a). The *Shea* court similarly declined the invitation "to usurp Congress' legislative functions" with an interpretation that "fl[ies] in the face of a clear congressional intent to apply the statute's proscriptions to commercial and non-commercial content providers alike." 930 F.Supp. at 949-50.

Third, the government creates a smokescreen to hide the overwhelming unconstitutionality of all of the CDA's provisions by attempting to distinguish §223(a)(1)(B) and §223 (d)(1)(A) from §223(d)(1)(B). J.S. at 20-21. For several reasons, the smokescreen should not divert the Court. Most significantly, the government did not present the argument below. *See Holly Farms Corp. v. NLRB*, 517 U.S. __, 116 S.Ct. 1396, 1402 n.7 (1996)(declining to entertain argument that petitioners had failed to advance previously, because the Court "generally do[es] not address arguments that were not the basis for the decision below"), quoting *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. __, 116 S.Ct. 873 n.5 (1996). Until it reached this Court, the government never suggested that any of the CDA's provisions would apply

[18] Nor, said Judge Sloviter, could the statute's overbreadth be cured by the government's suggestion that it probably would not prosecute "works of serious literary or artistic merit," for that would "require a broad trust indeed from a generation of judges not far removed from the attacks on James Joyce's ULYSSES as obscene . . . . The bottom line is that the First Amendment should not be interpreted to require us to entrust the protection it affords to the judgment of prosecutors." *Id.* at 83a.

only to the direct and intentional communication of indecency to a specific person known to be a minor. To the contrary, both the government and the plaintiffs proceeded below on the assumption that each of the challenged provisions in the CDA applied to all online communications that might be seen by any minor. The government therefore relied on "safe harbor" defenses that the district court found to be constitutionally inadequate. The government's disappointment with those findings does not permit it to reinterpret the statute on appeal.

In any event, the government's effort to draw distinctions between the challenged provisions of the CDA is not supported by a fair reading of the statute when viewed as a whole. Section 223(a)(1)(B) and §223(d)(1)(A) suffer from the same *Butler* and *Sable* problems of overbreadth that are fatal to §223(d)(1)(B)'s "display" provision. Every online speaker in the publicly accessible areas of cyberspace (including the World Wide Web, newsgroups, mailing lists, and chat rooms) would have to reduce his or her speech to that which is suitable only for minors in order to avoid criminal penalties under any of the provisions. Specifically, §223(d)(1)(A) makes it a crime to "knowingly use[] an interactive computer service to send to a specific person or persons under 18 years of age" any material that is "patently offensive." It does *not* require that the defendant "know" that the recipient is a minor, but rather only requires that the defendant "knowingly use[] an interactive computer service." Thus, *any* use of an interactive computer service to communicate in the vast public areas of cyberspace could result in the sending of "patently offensive" material "to a specific person . . . under 18." Similarly, §223(a)(1)(B) makes it a crime to "make[], create[], or solicit[], and initiate[] the transmission of" any indecent material "knowing that the recipient of the communication is under 18 years of age." The user "knows" that minors have access to the vast public

portions of cyberspace; thus, the user risks prosecution under §223(a)(1)(B) because simply by speaking in these spaces the user may have knowingly "initiat[ed] the transmission" of indecent material to a person under eighteen.

Moreover, Congress clearly applied the "safe harbor" defenses of §223(e)(5) to all three provisions of the CDA.[19] If §223(a)(1)(B) and §223(d)(1)(A) were meant to apply only to persons who intentionally communicated indecent or patently offensive material to a particular person they knew to be a minor, it would be nonsensical for such defendants to assert §223(e)(5)(A)'s "good faith" defense, or §223(e)(5)(B)'s "verified credit card" defense, to avoid prosecution.[20] Thus, contrary to the government's new interpretation in its Jurisdictional Statement, *all three provisions* of the CDA potentially affect communications between adults, and will have a serious chilling effect on online communication.[21]

The fourth argument the government makes for plenary review is that the Court should take the case to consider whether the CDA is unconstitutionally vague. J.S.App. 86a-87a (Buckwalter, J.); *id.* at 80a (Sloviter, C.J.). But the

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[19] Section 223(e)(5) provides "a defense to a prosecution *under subsection (a)(1)(B) or (d)*" (emphasis added).

[20] In addition, the problem of coercion and enticement of minors via computer, which would appear to be the rationale for any provision covering intentional communications to minors, was already covered elsewhere in the CDA, at §508, codified at 18 U.S.C. §2422(b). Plaintiffs do not challenge that provision.

[21] The government's new argument also ignores the scope of the "indecency" and "patently offensive" prohibitions, which includes a vast amount of material that has social value -- indeed, that may be life-saving -- for older minors. *See generally* pp.4-7 & n.7, 10-12, *supra*, and Appendix.

Court may summarily affirm without reaching the vagueness issue. It was the CDA's overbreadth and its failure to meet strict scrutiny that was the dispositive issue both in this case and in *Shea*. In addition, as discussed above, given the new and evolving medium of cyberspace, it may be premature for the Court to rule on whether, in the context of the online medium, the "indecency" and "patently offensive" provisions provide adequate guidance for millions of speakers to avoid criminal prosecution.[22]

Finaliy, the government argues that plenary review is appropriate because "[i]n light of the rapid development and innovative capabilities of all components of the Internet industry, there is every reason to expect that technological steps will occur swiftly if the CDA's indecency restrictions are upheld." But, as Judge Sloviter wrote, "I can imagine few arguments less likely to persuade a court to uphold a criminal statute than one that depends on future technology." J.S.App. 82a. In addition, the expansion of existing industry alternatives to empower parents to control Internet content -- rather than somehow legitimizing the CDA -- merely illustrates that less restrictive alternatives to the CDA's draconian ban are clearly available and, therefore, as the trial court correctly held, the CDA fails strict scrutiny.

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[22] *See generally* pp.4-7, *supra*. Contrary to the government's assertion, however, the vagueness holding of the lower court is not precluded by this Court's decisions in *DAETC*. Unlike the CDA, the statute at issue in that case did not impose criminal sanctions, involved an entirely different medium, and did not raise questions about the viability of applying local community standards in a global medium. As Judge Buckwalter pointed out, "In statutes that break into relatively new areas, such as this one, the need for definition of terms is greater, because even commonly understood terms may have different connotations or parameters in this new context." J.S.App. 101a.

CONCLUSION

For the reasons stated above, the ACLU appellees respectfully move for summary affirmance of the preliminary injunction entered by the three-judge district court.

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Dated: October 31, 1996

APPENDIX

THE PARTIES' STIPULATIONS IN PREPARATION FOR THE PRELIMINARY INJUNCTION HEARING

* * * * *

II. *ACLU v. RENO* PLAINTIFFS AND THE CONTENT OF THEIR SPEECH

A. AMERICAN CIVIL LIBERTIES UNION

70. The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of nearly 300,000 members that describes itself as dedicated to defending the principles of liberty and equality embodied in the Bill of Rights. The ACLU is incorporated in District of Columbia and has its principal place of business in New York City.

71. In addition to its legal advocacy, the ACLU devotes considerable resources to advising the public as to its views concerning civil liberties. Since 1993, the ACLU's public education efforts have included extensive online resources that offer electronic copies of ACLU publications, reports, court briefs, news releases, and other material related to the ACLU's legal, legislative, educational and advocacy work. The ACLU's online resources also include interactive discussion groups, chat rooms, and special online events that allow users to discuss and debate a variety of civil liberties issues.

72. The National Office of the ACLU maintains its public online resources through two separate online services, America Online (AOL) and the Internet's World Wide Web. The ACLU has a contract with America Online (AOL) to provide online resources through the AOL online service. The ACLU has a separate contract with New Media Publishing, Inc. to provide online resources through the Internet's World Wide Web. The AOL site offers interactive discussion groups, chat rooms, and special online events that are not

offered through the Internet site. Otherwise, the material offered through the two services is substantively the same.

73. In 1995, the ACLU posted hundreds of separate documents to its America Online site, and it expects to increase the number of online publications in 1996 on both the AOL site and the web site.

74. The Public Education Department of the ACLU's National Office in New York, New York creates and formats ACLU information for both the America Online site and the Internet site. Using electronic mail, the ACLU's affiliate offices in all fifty states forward relevant information to the ACLU's Public Education Department to be included in the ACLU's online resources.

75. While the ACLU's online resources on America Online are physically located in computers owned and maintained by America Online, Inc. of Vienna, Virginia, the ACLU has editorial control over the site by contract. Only AOL subscribers can access the ACLU information on the AOL system.

76. While the ACLU's online resources on the Internet web site are physically located in computers owned and maintained by New Media Publishing of Falls Church, Virginia, the ACLU has editorial control over the site by contract. All online subscribers that have access to the Internet can access the ACLU's web site.

77. In addition to the Internet web site and the America Online site maintained by the ACLU's Public Education Department at the National Office, many ACLU affiliate offices provide their own online resources through separate service providers. Many of the ACLU's fifty state affiliate offices have established their own web pages, usually through a service provider in their own state. The National Office web site creates links to these affiliate web sites, but the affiliate web site information is physically stored on

various computers depending upon the service provider used by the state affiliate office.

78. The ACLU is involved in cases and advocacy regarding what it describes as "arts censorship, obscenity law and indecency law, discrimination against gays and lesbians, and reproductive freedom." The ACLU has posted the text of the famous "Seven Dirty Words" comic monologue which was at issue in the 1978 *FCC v. Pacifica* case. The ACLU has an online feature that allows users to guess what the famous "seven dirty words" are. The ACLU allows the user to access the correct answer by reading the Court decision or the ACLU's brief in the case. In honor of its recent 75th anniversary, the ACLU also published a list entitled "The ACLU's 75 Greatest Hits" that documents the ACLU's involvement in 75 United State Supreme Court cases. The online version of the list includes the text of the brief that the ACLU filed for each case with the Supreme Court. The brief the ACLU submitted in *Cohen v. California*, a case concerning a man who wore a jacket that bore the words, "Fuck the draft," while walking through a courthouse corridor, is available on ACLU's online resources. In addition, the ACLU's online resources include a trial court opinion in *U.S. v. Jake Baker*, a federal district court case concerning a student who was prosecuted for posting certain online fictional stories and messages. The opinion quotes from the defendant's postings.

79. The ACLU's Internet sites also provide links to other Internet sites as a resource for online users. For example, when accessing an ACLU online file on civil liberties in cyberspace, the ACLU site provides a link so that the user can "jump" to a related site hosted by the Electronic Frontier Foundation. In turn, EFF's site provides further links to additional online sites that deal with the subject.

80. The ACLU's site on America Online also hosts unmod-

erated online discussion groups that allow citizens to discuss and debate a variety of civil liberties issues. These include a "free speech zone," in which users can simultaneously chat online about current issues; the "Bill of Rights bulletin board," an online bulletin board that allows users to post messages on particular civil liberties topics; and live "auditorium" events, in which a featured speaker "talks" online on a particular issue and users can respond simultaneously with online questions. Past speakers have included Camille Paglia (academic and commentator on "sexual politics") and Harvey Fierstein (actor and gay rights activist). The ACLU's Public Education Department changes the online topics frequently to address current civil liberties issues. Users are also permitted to create bulletin board topics of their own choice. For example, users of the ACLU site on AOL have discussed the content of Howard Stern's best-selling book, *Private Parts*; masturbation, in the context of the firing of Jocelyn Elders; discussions of the word "fuck"; and discussions of First Amendment issues regarding pornography. See ACLU exhibits in the ACLU Plaintiffs' exhibit books.

81. The ACLU does not moderate its online discussion groups.

82. In addition to its public online resources, the ACLU leases space on American Online that may be accessed by ACLU staff but not by other America Online subscribers. The AOL space allows ACLU staff and members to exchange documents and information on bulletin boards and through e-mail. ACLU staff and members also use other online services (sometimes through America Online, and sometimes through other Internet Service Providers) that include e-mail, online mailing lists and discussion groups, and bulletin board systems. Some of these communications also concern the matters indicated in ¶ 9 *supra*.

83. Many ACLU staff and members receive requests for information by e-mail messages. Some of these communications also concern the matters indicated in ¶ 9 *supra*. The ACLU does not currently verify the age of the person requesting the information.

84. Many of the ACLU's nearly 300,000 members use online communications. They both receive and transmit information across the range of online communications.

B. HUMAN RIGHTS WATCH (HRW)

85. Human Rights Watch is a nongovernmental organization established in 1978 to monitor and promote the observance of internationally recognized human rights in Africa, the Americas, Asia, the Middle East and among the signatories of the Helsinki accords. Human Rights Watch is supported by contributions from private individuals and foundations worldwide. It accepts no government funding. Human Rights Watch has offices and staff around the world and is incorporated in New York state.

86. Human Rights Watch staff investigate human rights abuses around the world. A growing number of its field investigators are using the Internet, including electronic mail (e-mail), to communicate with other staff, human rights activists and dissidents. Human Rights Watch transmits reports electronically using local phone lines.

87. Human Rights Watch staff use e-mail to communicate with each other, particularly when staff are located abroad or at a distance from its offices. These communications often concern its research, including research on sexual abuses. The staff has sent testimonies, eyewitness accounts, and reports on abuse via e-mail on topics such as the trafficking of women as sex workers and sexual torture.

88. Human Rights Watch also maintains a gopher Internet site, accessible to anyone at gopher://gopher.humanrights.

org:5000. Gopher is a "menu-driven" Internet system. As of January, 1996, this gopher site contained approximately 325 Human Rights Watch press releases and excerpts of reports, with most of these documents consisting of 2-3 pages of text. These materials as well as additional ones not available on-line are also available in print form.

89. Human Rights Watch reports concern facts on the situation of human rights abuses in the specific country or region and eyewitness accounts of abuses. Some of the accounts concern torture, rape, mutilation, execution, and mass murder.

90. HRW's July, 1995 press release on slavery in Pakistan is posted at its gopher site. A March 1995 press release on abuses by Nigerian security forces in Ogoniland is also posted at its gopher site. Its October 1993 report on the abuse of Burmese refugees from Arakan is posted on the newsgroup reg.seasia. See HRW exhibits in ACLU Plaintiffs' exhibit book.

91. In addition to its gopher site, many of its staff around the world access Internet newsgroups or subscribe to electronic mailing lists called listervs that discuss human rights abuses or expose possible abuses. One of the issues investigated by the Human Rights Watch staff is the sexual exploitation of women. Staff members access newsgroups such as reg.seasia, reg.indonesia and reg.sasia in order to track human rights issues in Asia. See HRW exhibits.

92. Human Rights Watch seeks to educate the public about human rights abuses around the world. Human Rights Watch reports include references to sexual and violent abuse.

C. ELECTRONIC PRIVACY INFORMATION CENTER

93. The Electronic Privacy Information Center (EPIC) describes itself as a non-profit research organization that col-

lects and disseminates information concerning civil liberties and privacy issues arising in new electronic communications media.

94. Created in 1994, EPIC is a project of the Fund for Constitutional Government (FCG), a publicly supported, charitable, nonprofit corporation incorporated in the District of Columbia. FCG, established in 1974, describes itself as dedicated to protecting civil liberties and constitutional rights. Both EPIC and FCG have their principal places of business in Washington, DC.

95. EPIC's public education efforts include the maintenance of extensive online resources that offer electronic copies of EPIC publications, reports, court briefs, news releases, international treaties, U.S. government documents obtained under the Freedom of Information Act, and other materials related to EPIC's educational work.

96. EPIC maintains its public online resources through a "site" on the Internet's World Wide Web, and through a "listserver" mailing list, which EPIC makes available to anyone with an Internet electronic mail address.

97. The resources available on EPIC's web site reside on a computer system physically located within EPIC's offices in Washington, DC, accessible through computers that have access to the Internet.

98. EPIC's electronic resources include materials concerning free speech and privacy issues. For example, the EPIC Web site contains the text of the U.S. Supreme Court's opinion in *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978), in which the Court reproduced the so-called "seven dirty words" monologue as an appendix to its opinion. The Web site also contains the text of the Supreme Court's opinion in *Cohen v. California*, 403 U.S. 15 (1971), concerning the conviction of a man for

wearing a jacket that bore the words, "Fuck the draft."

99. EPIC's Web site also contains a section entitled "Internet Censorship." The materials available in this area include the text of the Communications Decency Act and other related legislation. Also included is the text of poems written by subscribers of the America Online (AOL) service and removed from that system by AOL management. See EPIC exhibits in ACLU Plaintiffs' exhibit book. The "Internet Censorship" area also contains a list of Usenet newsgroups that temporarily were removed from the Compuserve system, reportedly in response to German government requests.

D. ELECTRONIC FRONTIER FOUNDATION (EFF)

100. The Electronic Frontier Foundation is a nationwide, nonpartisan organization of approximately 3,500 paying individual members that describes itself as committed to defending civil liberties in the world of computer communications, to developing a sound legal framework for that world, and to educating government, journalists, and the general public about the legal and social issues raised by this new medium. The EFF is incorporated in State of California, and has its principal place of business in San Francisco.

101. Since its inception in 1990, the EFF has devoted resources to advising the public as to EFF's views concerning civil liberties and other legal issues as they arise in cyberspace. Throughout EFF's existence, it has initiated and/or moderated several online forums, including a forum on the WELL (a California-based conferencing system and Internet Service Provider), on Usenet (the newsgroups comp.org.eff.talk and comp.org.eff.news), and on America OnLine. These forums are primarily interactive discussion groups, but EFF representatives also frequently participate in chat rooms, and in special online events that allow users to discuss and debate a variety of legal and constitutional issues.

102. In addition, EFF has its own computer site on the Internet, and its name (sometimes referred to a "domain name") is "eff.org". EFF's public-education efforts include the maintaining of extensive online resources both on the forums it runs with online service providers, and on its own Internet site. These resources include articles, court cases, legal papers, news releases, newsletters, and excerpts from public discussions related to the EFF's legal, legislative, educational and advocacy work. EFF also maintains a "home page" on the World Wide Web, accessible through computers that have access to the Internet.

103. EFF also maintains eight online mailing lists, both for specific civil-liberties issues and for informing the public about its activities.

104. EFF's Web site and many of its online resources are based on a computer in San Francisco, accessible through computers that have access to the Internet. The EFF resources and forums that are maintained on the WELL, on America OnLine, and on other commercial online forums are accessible through those systems. The material EFF makes available on America Online and other commercial service providers is subject to the Terms of Service of those providers' subscription contracts.

105. EFF advises individuals and groups about issues concerning legal rights and responsibilities in the online world. In addition, EFF advocates positions, and promotes discussions, about what those rights and responsibilities should be. For example, EFF has published in several forums a discussion of the Supreme Court's decision in *FCC v. Pacifica* and its progeny concerning the definition of the term "indecency." In discussing the issue of "indecency," EFF refers in detail to such texts as the George Carlin comedy monologue that is the subject of the litigation in *Pacifica*, to the transcripts of Howard Stern broadcasts, and to literary works such as those of Allen Ginsberg and James Joyce. EFF's

Web site also provides "links" that enable users to visit other sites that contain discussions and examples as described in this paragraph. See EFF exhibits in ACLU Plaintiffs' exhibit book.

106. Most of EFF's approximately 3,500 members use online communications. They both receive and transmit information across the range of online communications.

E. JOURNALISM EDUCATION ASSOCIATION (JEA)

107. The Journalism Education Association is a national organization of high school journalism teachers and publication advisors. Formed in 1924, JEA is incorporated in Minnesota and has its headquarters in Manhattan, Kansas. It has almost 1600 individual members who reside throughout the country.

108. JEA was formed in 1924 to serve journalism educators through supporting student expression, creating aids for curriculum and instruction, facilitating the involvement of minority students, promoting the use of technology, and emphasizing professionalism through certification, workshops, conventions, and publications.

109. Many JEA members are high school journalism teachers. JEA members use online communications as part of a course of instruction in high school journalism classes. JEA members who are teachers instruct students in the classroom, for example, on use of online communications for news gathering and journalistic research. JEA members who are teachers also authorize students to conduct their own online research using school computers either in the classroom or on their own time in school computer labs.

110. Some students of JEA members have access at school to online communications about a range of subjects.

111. Many JEA members are publication advisors for high school student newspapers. JEA members who are publication advisors authorize students to use school computers to conduct their own online research for student publications.

112. An increasing number of JEA members are advisors for online student publications. These JEA members instruct students on online publishing techniques and authorize students to use school computers to publish their own online newspapers.

113. One JEA member recently assisted a student with online research for an article on media images of women. The search led to online sites that contained graphic information and pictures, including depictions of violence against women, and including pornographic images of women. See JEA exhibits in ACLU Plaintiffs' exhibit book.

F. COMPUTER PROFESSIONALS FOR SOCIAL RESPONSIBILITY

114. Computer Professionals for Social Responsibility (CPSR) is a non-profit 501(c)(3) corporation founded in 1981 and incorporated in the state of California since 1983. Its national office is located in Palo Alto, California. CPSR is a national membership organization with 22 chapters located in 14 states. As of February, 1996, CPSR has approximately 1,550 members.

115. CPSR describes itself as a public-interest alliance interested in the impact of computer technology on society. CPSR members provide the public and policy makers with their opinions about the power, promise, and limitations of computer technology. CPSR also directs public attention to issues concerning the application of computing. Membership is open to anyone who uses or is concerned about the role of information technology in our society.

116. The National CPSR Web home page was established

in April 1994. CPSR uses Internet servers of Sunnyside Computing, located in Palo Alto, California for its Internet services. Its Web page address is http://www.cpsr.org/home.html. This home page contains official CPSR documents analyzing such issues as government policies concerning the Internet, encryption issues, and health issues raised by working in the computer industry. Currently, documents include reports issued by CPSR and relevant foundations, Op-Ed pieces and information about how to get involved with CPSR and other related computer advocacy organizations.

117. CPSR sponsors a number of working groups, comprised of members and other invited people who work together to develop ideas, issues, conversations, actions and projects that relate to CPSR's mission.

118. The various CPSR working groups and projects maintain their pages autonomously; any documents or links from these autonomous Web pages are included at the discretion of each group's members. Like the main CPSR Web page, these independent CPSR Web pages are linked, indirectly, to issues the group or project decides are relevant.

119. In addition, most of these Web pages contain archives on previous newsgroup or listserv discussions. CPSR Web pages contain information regarding gender issues, sexuality and abortion.

120. CPSR sponsors nearly 20 listservs which it makes available to anyone with an Internet electronic mail address. Listservs are electronic mailing lists in which any subscriber messages are posted to other members of the mailing list. A number of the listservs are moderated, with moderators screening messages for relevancy to the topic and discussion of the listserv.

121. CPSR's Campaign for Cyber-Rights working group established in the beginning of 1995, describes itself as seeking to raise awareness of issues surrounding the commercial

development of "cyberspace." The Cyber-Rights working group sponsors a Cyberjournal, a moderated listserv and a general discussion list on global political trends that are relevant to cyberspace. Cyber-rights maintains an extensive archive, located at http://www.cpsr.org/cpsr/nii/cyber-rights/.

122. Several postings on the Cyber-rights listserv include references to racial or ethnic slurs and depictions of body parts and functions. See CPSR exhibits in ACLU Plaintiffs' exhibit book.

G. NATIONAL WRITERS UNION (NWU)

123. The NWU is a trade union for freelance writers that is registered in New York as an unincorporated non-profit organization and affiliated with the AFL-CIO through the union's membership in the UAW. Its members include technical writers, journalists, book authors, poets, novelists, ghostwriters, corporate writers, cartoonists, and other active writers. The NWU has over 4,000 members nationwide.

124. The NWU uses the Internet extensively to communicate with its members and discuss and publish their writing and receive a response. It maintains a number of Internet services, such as an Internet World Wide Web page, a file transfer protocol (ftp) site and listservs.

125. Since July, 1995, the NWU has operated a Web site whose home page, which has a table of contents, is located at http://www.nwu.org/nwu/, accessible through computers that have access to the Internet. The server for this Web site is located in San Francisco, California and is operated by Labornet.

126. NWU controls the contents of its Web site. NWU currently does not allow members to add links from the NWU Web site to their own Internet sites. Some members have linked their own Web pages to the NWU Web page,

however.

127. The NWU Web page does not require any form of registration or payment to access.

128. The NWU ftp site located at ftp://ftp.netcom/nw/nwu allows users to download available NWU documents online. The ftp site currently contains 25 documents, which total approximately 243 pages of text. The ftp site is operated by Netcom, an Internet server company with computers located around the country. Just as with the Web page, all documents available via ftp are products of national and local NWU committees, campaigns, and boards. The personal work of union members are not posted.

129. NWU's "PIC Newsletter" contains discussions of issues relating to the arts, for example, a discussion of Andres Serrano's photograph, "Piss Christ."

130. NWU members also communicate by subscribing to NWU's listservs, "nwu-chat" and "nwu-queer," both of which are also open to non-members. See NWU exhibits in ACLU Plaintiffs' exhibit book.

131. "NWU-queer" is for writers who are gay, lesbian, bisexual, or "transgendered," their colleagues and all other working writers covering the issue of sexual orientation. Topics addressed include jobs, politics, spirituality, activism, health, and erotica. NWU-queer currently has 150 subscribers.

132. "NWU-chat," which currently has 250 subscribers, is a forum for information relating to writing or the publishing industry. The listserv's main topics concern "writers' rights" (especially regarding the electronic media and copyright in general) and practical considerations such as where to get ertain works published. It also discusses other topics such as free speech and the imprisonment of political dissidents.

133. Although the listservs are not moderated, NWU does have guidelines on participation.

134. A number of NWU members maintain their own Web pages. The contents of these Web pages are varied: some members advertise their writing services, publish their works, provide information about the NWU, or discuss political issues important to them as writers. Most of these sites contain both graphical and textual material.

H. CLARINET COMMUNICATIONS CORP.

135. ClariNet is a privately held California corporation formed in 1991 and located in San Jose that publishes electronic information of different types.

136. Among ClariNet's publications is an electronic newspaper entitled the "ClariNet e.News." The newspaper provides subscribers with online news, sports, financial information, and other reading material on a variety of topics. The newspaper is distributed in Usenet format to approximately 1.2 million paying subscribers. With a few exceptions, the newspaper is not sold directly to individuals but is available through Internet service providers who provide the newspaper as part of their basic service and through educational institutions and corporations.

137. The news articles in ClariNet e.news are taken from the same wire services from which print newspapers obtain their stories. ClariNet has occasionally published articles that use four letter words. It has also occasionally published articles that explicitly describe rapes and sexual assaults.

138. ClariNet also publishes a humor newsgroup in Usenet format at rec.humor.funny and on the World Wide Web. Although many people submit jokes, the humor section is moderated for quality. Two daily jokes are distributed and all of the jokes are archived. Some of the jokes discuss sexual acts including oral sex. Some jokes also use strong

language. Where ClariNet deems it appropriate, jokes are accompanied by a disclaimer stating that they may not be suitable for minors. See ClariNet exhibits in ACLU Plaintiffs' exhibit book.

139. Both the newspaper and the humor newsgroup allow readers to link to other sites.

I. INSTITUTE FOR GLOBAL COMMUNICATIONS

140. The Institute for Global Communications (IGC) is a national computer service provider that offers access to the Internet, as well as other on-line services. Created in 1986, IGC is the project of a California public charity that has its central office in San Francisco, California.

141. IGC describes itself as aiming to offer high quality, low-cost computer networking services and Internet access, primarily to non-profit organizations. The IGC networks have functioned as means of communication for many non-profit organizations nationwide. IGC also trains non-profits in how to use computer communications to more effectively carry out their programs. Most of the non-profits work in the areas of human rights, women's rights, environmental issues, labor, and conflict resolution. Some are small community groups; some are large national organizations.

142. IGC states that it currently provides on-line services, including Internet access, to approximately 15,000 organizations, including approximately 500-600 schools. A majority of the non-profits who use its services are organizations concerned with human rights and the environment. A growing number of its clients are concerned with health issues, such as HIV/AIDS and women's health.

143. A few of the organizations who currently use IGC as their Internet access provider include SIECUS (the Sex Information and Education Council of the United States), the

Family Violence Prevention Fund, Stop Prisoner Rape, Human Rights Watch, Pacifica Radio, Amnesty International, UNICEF, AIDS Treatment News, Institute for Intercultural Understanding, International Gay and Lesbian Human Rights Commission, InsideOUT, LambdaLetters (HIV Information), On the Issues (progressive women's quarterly), Population Action International, Planned Parenthood, Catholics for a Free Choice, Asians and Pacific Islanders for Reproductive Health, The Center for Reproductive Law and Policy, The Hesperian Foundation and the Native American Women's Health Resource Center. IGC does not monitor the content of organizations' on-line activity. Some of the organizations listed above discuss and disseminate information about human sexuality, reproductive issues, human rights, and obscenity issues.

144. As part of its Internet access, IGC makes available to members thousands of Internet discussion groups and operates, on behalf of members, hundreds of public mailing lists or discussion groups. Lists operated by IGC include those on topics of gay and lesbian human rights, AIDS and HIV treatment, women's health and violence against women. These and other discussion groups may sometimes discuss human sexuality and human bodily functions.

J. STOP PRISONER RAPE

145. Stop Prisoner Rape, Inc. (SPR) is a non-profit corporation that describes itself as dedicated to combating the rape of male and female prisoners and providing assistance to survivors of jailhouse rape. SPR is a national organization, founded in 1980 and incorporated in New York State in 1994.

146. SPR describes its purpose as to provide education, information, and advocacy regarding sexual assault in the nation's prisons, jails and juvenile institutions. See SPR exhibits in the ACLU Plaintiffs' exhibit book.

147. SPR maintains a site on the Internet that relates the experience of prisoners who have been raped, offers advice, and provides information to the general public on the issue of prisoner rape. SPR's web site is located at http://www.igc.apc.org/spr/.

148. Information is sent to SPR from prisoners and former prisoners across the country, and SPR determines what to include on the SPR Web Site.

149. The SPR Web site contains a variety of textual and graphical documents concerning prisoner rape: a number of testimonials and excerpts of letters from survivors of prisoner rape, information on high profile cases that SPR monitors, SPR reports on national and state legislation dealing with prisoner rape, government documents, statistical reports, bibliographies, AIDS prevention information, articles, transcripts of lectures, advice literature to prisoners, press releases, news alerts, and SPR legal documents. See SPR exhibits.

150. The SPR Web Site also links to other Web Sites it deems relevant to the problem of prisoner rape such as The Federal Bureau of Prisons, The National Institute of Corrections, the American Bar Association, magazine articles, and scholarly texts.

151. SPR also provides information through postings to the Usenet Newsgroups, especially "alt.prisons" and "talk.rape." Some of what SPR posts includes occasional materials of the type described above in connection with its Web site. Many of the posts to newsgroups consist of answers to questions or comments on messages posted to others and usually quotes verbatim the question or comment that elicited the response.

152. SPR also uses electronic mail via the Internet for internal communications. It also maintains an electronic listserver mailing list, which it makes available to anyone with

an Internet electronic mail address. These listserver programs include lists dedicated to stopping rape, prison issues and incarceration health care issues, among others. SPR currently exercises no control over subscriptions to these lists. SPR is currently in the process of setting up its own listserver subscription operation. The content of outgoing electronic mail is similar to messages to Usenet Newsgroups described above.

153. Information provided by SPR on its Web Site is graphic and sexually explicit. The SPR home page contains two disclaimers regarding the sexually explicit nature of some of the contents.

154. The SPR Web Site contains prisoner accounts of rape.

K. AIDS EDUCATION GLOBAL INFORMATION SERVICE (AEGIS)

155. The AIDS Education Global Information System ("AEGIS") is a Bulletin Board System ("BBS") established in 1990 that contains a database on HIV and AIDS. The hardware for AEGIS is located in San Juan Capistrano, California. AEGIS is incorporated as a nonprofit 501(c)(3) educational corporation in California. Prior to the incorporation of AEGIS, AEGIS functioned as an AIDS outreach ministry of the Sisters of St. Elizabeth of Hungary, also incorporated in the State of California.

156. AEGIS is currently available by dialing (714) 248-2836. AEGIS allows all users free access for up to 20 minutes per day. Users must register by providing a first and last name, address and phone number. Registered users may access all AEGIS conferences and databases for up to 20 minutes per day and may download up to 1 MB of information per session. Registered subscribers ($36/year individuals, $60/year organizations) receive unlimited use of AEGIS, participation in conferences, unlimited downloading, the

ability to send and receive e-mail, use of an offline text reader and are able to uplink to additional resources.

157. Although AEGIS currently has no direct link to the Internet, other than e-mail and a UUCP newsfeed, it is working to establish a Web site during the first or second quarter of 1996. The National Library of Medicine, a branch of the Federal Government, has given AEGIS a grant that will cover part of the cost of establishing this Internet site.

158. The Systems Administrator ("Sysop") for AEGIS is responsible for the daily maintenance of AEGIS, which includes locating information on the Internet from government and non-government organizations from around the world. The Sysop imports this material into the AEGIS database, and exports it daily via a file transfer system known as FIDONET. In cooperation with HIVNET, whose home page is located on the Internet at http://www.hivnet.org, AEGIS offers AIDS information in English, as well as French, Dutch, German and Spanish.

159. AEGIS states that as of March 14, 1996 it had 1,340 registered members and received approximately 25-75 calls per day. Because AEGIS is a BBS, the number of visits it receives is limited by the number of modems connected to the BBS hardware. Currently AEGIS allows up to five users simultaneous access. AEGIS states that it currently contains 2 gigabytes of information, which includes over 104,000 files from the National Library of Medicine's AIDSLINE database.

160. AEGIS provides access to a wide variety of information, such as technical medical reports, legal information, various discussion groups and personal testimonies of people living with AIDS. Periodical documents available on-line include, but are not limited to: The Center for Disease Control AIDS Daily Summary, AIDS Treatment News, Gay Men's Health Crisis Treatment Issues, Health Information

Community Newsletter and Body Positive Online Magazine, as well as the texts of AIDS reports and studies. AEGIS members may join mailing lists for discussion groups and newsgroups that discuss AIDS-related issues, including AIDS drugs, spirituality, and women's issues. Much of this information is available in English as well as Dutch, French, German and Spanish.

161. AEGIS is available to anyone who can access the BBS.

L. BIBLIOBYTES

162. BiblioFile Books On Computer, doing business as BiblioBytes, is a company that was founded in January 1993 for the purpose of selling electronic versions of print books over the Internet's World Wide Web.

163. BiblioBytes is incorporated in New Jersey and has its principal place of business in Hoboken, New Jersey.

164. BiblioBytes contracts with publishers and writers to obtain the rights to publish the electronic version of books that have previously been published in print form. BiblioBytes currently has the rights to over one thousand titles. BiblioBytes also publishes some texts that have not been previously published in print form and that are available for purchase only online. The books available through BiblioBytes cover a variety of genres including mystery, science fiction, romance, fantasy, erotica, and classics.

165. BiblioBytes' web page provides information about the company and a list of available book titles, arranged by genre, that can be purchased. An interested buyer can place an order by e-mailing an order form to BiblioBytes. The order form, which requires name, address, credit card number, and order information, can be filled out directly on the BiblioBytes web site. Once BiblioBytes receives the order by e-mail, it sends the electronic book to the buyer via e-

mail after verifying and charging the credit card.

166. BiblioBytes sells an electronic version of Harlan Ellison's collection of short stories, "Love Ain't Nothing But Sex Misspelled." BiblioBytes also sells a book (available only online) by John Anderson entitled "Panaflex X."

167. BiblioBytes owns the rights to reproduce in electronic form exact copies of books that already exist in print form. These "rights" do not include the right to alter the content of the books.

M. QUEER RESOURCES DIRECTORY (QRD)

168. Queer Resources Directory (QRD) is an unincorporated association that provides an online archive of materials pertaining to lesbian, gay, bisexual, transsexual, and transgender issues.

169. The QRD's home page, an electronic table of contents, is located at http://www.qrd.org/QRD/, accessible through computers that have access to the Internet. See QRD exhibits in ACLU Plaintiffs' exhibit book. QRD requires neither payment nor registration for access to the QRD archive. Entirely run by volunteers, the QRD receives no funding aside from individual donations.

170. The primary QRD computer is located in Portland, Oregon. Distribution point computer locations include Beltsville, Maryland; Los Angeles, California; San Francisco, California; Christchurch, New Zealand; and Tel Aviv, Israel; the United Kingdom and Michigan. Communication with QRD's volunteers is done primarily by computer communications.

171. QRD describes its purpose as providing a comprehensive resource of anything on the Internet that pertains to lesbian and gay issues. The topics included in the QRD archive include academic reports and studies, legal documents,

professional publications and personal testimonies on topics such as parenting, families, marriage, youth organizations, religion, HIV/AIDS, media, conferences, celebrations, history, business issues, legal information, workplace issues, politics, activism, and directories of lesbian and gay organizations around the world. These main topics are linked to other Internet sites. The QRD contains textual, graphical, audio and video material.

172. Users who wish to add a link or a document to the QRD site submit their links to QRD archive. These new links and documents are periodically screened by a QRD volunteer to ensure that QRD reagrds them as topically relevant and that they meet QRD's quality standards. QRD does not maintain an official archive of erotic works. However, some of its materials make reference to gay and lesbian sex. For example, QRD's archive contains *FaT GiRL*, an electronic magazine ("e-zine") about fat lesbians. The magazine contains poetry, community resources, as well as some erotic fiction.

173. Some topics in the QRD pertain to issues of safer sex and HIV/AIDS, and, for example, provide sometimes graphic information on how to perform safer sex.

174. The QRD contains links to local magazines from around the world that pertain to lesbian and gay issues. These include, for example, *Hothead Paisan* and *Cuir Underground*, which contain sexual or erotic material. See QRD exhibits in ACLU Plaintiffs' exhibit book.

175. The SysAdmin to the QRD also uses other on-line services that pertain to the lesbian and gay community, including subscribing to online mailing lists.

N. CRITICAL PATH AIDS PROJECT, INC.

176. Critical Path Project, Inc. is incorporated in the State of Pennsylvania.

177. Since 1989, Critical Path AIDS Project has operated a 24-hour AIDS treatment telephone hotline, designed to answer questions for Persons with AIDS (PWAs) and health care workers with questions on symptoms, diagnosis, and treatment.

178. Critical Path AIDS Project has also operated a computer bulletin board system (BBS), also available to the public 24 hours a day, free of charge by dialing (215) 463-7160 by modem. The hardware for this BBS is located in Philadelphia. This BBS uses hardware and software designed to permit simulation of multiple, "real time" discussions on HIV/AIDS treatment and research.

179. In addition, since May, 1995, Critical Path AIDS Project has been providing an AIDS Web page on the World Wide Web. The URL address of this page is http://www.critpath.org. The Web page, either directly or through links to other locations, offers information about, among other things, the ways in which AIDS is transmitted. The Web page discusses the types of sexual activities that might put a person at risk for contracting AIDS and how a person might minimize or eliminate the risk of infection. See Critical Path exhibits in ACLU Plaintiffs' exhibit book.

180. Among the information that is or will be available on Critical Path's Web page is: 1) prevention and treatment information in eight or more Asian languages (under construction); 2) full-text clinical trials protocols from the major AIDS clinical trials networks; 3) research and treatment information for PWAs and health care workers; 4) links with organizations, data, and services world around, and 5) searchable databases of AIDS treatment newsletters and newsgroup discussions.

181. Critical Path's Web page offers access to databases at over 1000 research institutions around the world. The Page offers a search engine for, for example, an e-mail directory

for researchers at the National Institutes of Health. Critical Path maintains data on and links to information on alternative and complementary therapies. Critical Path links to libraries of photographs and microphotographs illustrating HIV and AIDS and its microbiology.

182. Critical Path also hosts the Web pages of a number of organizations, regional and national, such as We the People Living with AIDS/HIV of the Delaware Valley, Minority AIDS Project of Philadelphia, and "Fight-the-Right" Network.

183. Critical Path also hosts electronic mail lists, including one for the "Fight-the-Right" Network and one for the Penn Consortium (HIV doctors and researchers in the Philadelphia area).

184. Critical Path offers SLIP (Serial Line Internet Protocol) accounts to users free of charge. These accounts allow users to access the Internet without going through a commercial provider. Critical Path distributes a suite of software to persons who register for these accounts. This free, public domain software includes: Netscape (a Web page browser), Eudora (an e-mail manager), Free Agent (a newsgroup reader), a gopher client, an Archie client, Telnet, and FTP (File Transfer Protocol).

185. Critical Path has developed software interfaces for the data resources it makes available. These include 1) a search engine which searches text posted to sci.med.aids newsgroups since 1992 (approximately 500 gigabites); 2) a search engine which searches text in newsletters in Critical Path's extensive AIDS newsletter library; 3) a collection of search engines which search the World Wide Web and gopher sites for the search term(s); and 4) a feedback form for our users to describe the most used features of our web page and to offer criticisms.

186. Critical Path AIDS Project has offered its shell ac-

count and/or SLIP account users access to a full-feed of USENET newsgroups. It does not subscribe to some newsgroups which are primarily libraries of pictures.

187. Critical Path AIDS Project has about 1,100 registered BBS users and approximately 120 users with SLIP accounts or shell accounts. It intends soon to upgrade its host system computer and expand the number of phone lines that it operates, which is currently 12.

188. Critical Path also is currently working with the Youth Health Empowerment Project (YHEP), which provides health counseling, outreach and AIDS information to youths. It will also be hosting a Web page for YHEP on its system.

O. WILDCAT PRESS, INC.

189. Wildcat Press Entertainment is a limited liability partnership established in 1994 and located in Beverly Hills, California. It is currently in the process of incorporating in the state of California. Wildcat Press is a division of Wildcat Entertainment. Wildcat Press also includes *YouthArts*, an on-line magazine by and about lesbian and gay youth. Wildcat Press publishes gay and lesbian literature, as well as the works of young gay and lesbian writers. Wildcat Press maintains several Internet sites.

190. Wildcat Press maintains a company Internet site containing text and graphics. The home page is located at http://www.gaywired.com/unity/wildcat/wildcat.htm and currently contains 13 pages of text. Computers for this site are physically located in Southern California and operated by Matt Skallerud of Southern California Gaywired. At this web site, Wildcat Press offers users the opportunity to order its books on-line as well as offering excerpts from two books by Patricia Nell Warren, THE FRONT RUNNER and HARLAN'S RACE. See Wildcat Press exhibits in ACLU Plaintiffs' exhibit book.

191. The Wildcat Press home page is an electronic table of contents pointing to materials found on its Internet site and is linked to other sites on the Internet.

192. Wildcat Press also publishes Ms. Warren's new on-line syndicated column, "News You Won't See on TV." The column consists of editorial-length commentaries focusing mainly on gay, lesbian, bisexual and transgender people in American society. The columns are sent via e-mail from wildcatprs@aol.com, the e-mail address of Wildcat Press, to a growing list of on-line newsgroups and print publications who have e-mail addresses.

193. In addition to publishing books, Wildcat Press also publishes two youth electronic magazines ("e-zine") called *YouthArts East* and *YouthArts West*, which are located at http://dolphin.upenn.edu/~lgba and http://spidey.usc.edu/qf/yap, respectively. The hardware for these e-zines operate out of the University of Pennsylvania and the University of Southern California. YouthArts also maintains a link page directing youth to other Internet sites. The original e-zine, *YouthArts East*, currently contains approximately 15 pages of text and graphics. The second e-zine, *YouthArts West*, currently contains approximately 100 pages of text and graphics. See Wildcat Press exhibits.

P. DECLAN MCCULLAGH DBA JUSTICE ON CAMPUS (JOC)

194. Justice on Campus began in the fall of 1995. It is housed on the private computer of a 17 year-old student at the Massachusetts Institute of Technology. Its web site is maintained by Declan McCullagh of Pittsburgh, Pennsylvania, who is currently a student at Carnegie Mellon University, due to graduate in the spring of 1996. Justice on Campus is accessible at http://joc.mit.edu/.

195. Justice on Campus describes its purpose as providing

an information clearinghouse on free speech issues on college campuses.

196. In the course of providing information on college campuses, Justice on Campus sometimes provides the text of the communications at issue and responds to them.

197. In addition to the foregoing, Justice on Campus maintains a listserv entitled "fight-censorship," started in November 1994. It is run out of computers at Carnegie Mellon University. The list currently contains about 140 people, including journalists and others interested in censorship issues. The list is intended to pass along information in the form of articles, press releases, reports, and opinions.

Q. BROCK MEEKS DBA CYBERWIRE DISPATCH

198. Brock N. Meeks is employed as the Washington, D.C. correspondent for Wired Magazine, a print publication covering cyberspace issues that is based in San Francisco, California.

199. Since late 1993, Mr. Meeks has published on the World Wide Web The CyberWire Dispatch, which covers cyberspace issues. There are currently 8,000 subscribers to CyberWire Dispatch. CyberWire Dispatch is published irregularly, but about once a week. It is sent out via the Internet on request from a computer in Fredericksburg, Virginia. Past issues are archived at www.cyberwerks.com on a computer at Liberty Hill Media Works, a computer consulting company in San Francisco, California.

200. CyberWire Dispatch contains "investigative stories," informational pieces, and commentary on cyperspace issues. For example, it investigates claims of people and companies offering services over cyberspace, provides information about the status of legislation affecting cyberspace, and comments on political issues dealing with technology.

201. CyberWire Dispatch commentaries include, for example, an article about the Marty Rimm study on pornography in cyberspace. See Cyberwire Dispatch exhibits in ACLU Plaintiffs' exhibit book.

202. CyberWire Dispatch also contains a column called "Muckraker," which can be found at www.hotwired.com.

R. JOHN TROYER DBA THE SAFER SEX PAGE

203. John M. Troyer is currently a graduate student in the Pharmaceutical Chemistry Department at the University of California, San Francisco. He also maintains an archive of information on the World Wide Web known as the Safer Sex Page, accessible at http://www.safersex.org/.

204. The Safer Sex Page began in June 1994. It is currently housed on a computer located in San Francisco. The Safer Sex Page charges no access fees for the site. It is currently recruiting a group of volunteers to help maintain and organize the site.

205. The Safer Sex Page describes itself as aiming to provide information on safer sex.

206. The Safer Sex Page is composed of two separate components: the information pages and the Safer Sex Forum. The information pages include brochures about safer sex, HIV transmission, and condoms, as well as resources for health educators and counselors. The Safer Sex Forum allows users to add their own comments to a monthly discussion topic or engage in a dialogue on other issues. The Safer Sex Page includes textual, graphic, audio, and video material. See Safer Sex exhibits in ACLU Plaintiffs' exhibit book.

207. Some of the brochures on the Web Page are based on information received from other groups including the Centers for Disease Control and Prevention, the United States

Department of Health and Human Services, and the Los Angeles Gay and Lesbian Community Services Center. Other brochures are written specifically for the Safer Sex Page by Mr. Troyer and other volunteers.

208. The Safer Sex Page provides information about safer sex practices. The Safer Sex Page also provides information helpful in avoiding other sexually transmitted diseases and unwanted pregnancy.

209. The Safer Sex Page contains a "disclaimer" that explains that it includes sexually explicit material that may offend some readers, or alternatively a "Parental Discretion Advised" advisory.

210. The Safer Sex information pages include, among other postings, the following material: guidelines regarding the HIV transmission risks of certain sexual acts; information about the use of dental dams during oral sex; discussion of lesbian sexual acts; an explicit cartoon showing how to use a condom; a video of a woman putting a condom on a realistic-looking plastic model penis; and a video of a man putting a condom on his penis. See Safer Sex exhibits.

211. The Safer Sex Forum includes language about sexual acts and practices. Past topics have included condom brands, how to talk about safer sex with a sex partner, and masturbation.

212. The Safer Sex Page states that it is currently planning to post material including anatomical photos of male and female genitalia, transcripts of interviews in which teenagers speak about their sexual activities, and articles describing how to eroticize safer sex precautions.

213. Mr. Troyer currently provides links that allow users of the Safer Sex Page to easily visit other sites with similar information.

214. In addition to maintaining the Safer Sex Page, Mr.

Troyer also uses other online services. For instance, he sometimes answers questions on safe sex on the Usenet at alt.safe.sex.

S. JOHNATHAN WALLACE DBA THE ETHICAL SPECTACLE

215. Jonathan Wallace is a software business executive and attorney based in New York City.

216. Under the pen name Jonathan Blumen, he maintains The Ethicl Spectacle, a monthly newsletter on the World Wide Web. The newsletter is accessible at http://www.spectacle.org.

217. The Ethical Spectacle began in January 1995 and rents space to house the newsletter from a computer server in Montclair, New Jersey. Each issue of the Ethical Spectacle is approximately 20-30 pages.

218. The Ethical Spectacle describes itself as aiming to address issues at the intersection of ethics, law, and politics in American life.

219. In the course of its discussions, the newsletter sometimes provides material such as: in June 1995, the Ethical Spectacle dealt with the Nazi concentration camp Auschwitz that included explicit descriptions of human experimentation, some of which dealt with sexual subjects. Also, in November 1995, the Ethical Spectacle excerpted from the writings of Nadine Strossen, Catharine MacKinnon, and Wendy McElroy on pornography and discussed the subject of pornography generally. See Ethical Spectacle exhibits in ACLU Plaintiffs' exhibit book.

220. The Ethical Spectacle provides links to sexually explicit material on the WEB.

T. PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.

221. Planned Parenthood Federation of America (PPFA) is a national voluntary health organization in the field of reproductive health care. PPFA describes itself as providing educational information about sexuality and reproductive health, as well as engaging in advocacy on these issues, including abortion. PPFA's 153 affiliates describe themselves similarly.

222. PPFA operates a site on the World Wide Web. The site is operated through the computer of plaintiff Institute for Global Communications, which is located in California. The site has been in operation since January 1, 1996.

223. PPFA's site provides sexuality education and reproductive health information. PPFA also provides an e-mail service, by which users can direct specific questions to PPFA, and they can provide specific answers. PPFA has received and responded to several inquiries through this mechanism.

224. PPFA provides information relating to practices to reduce unintended pregnancy and sexually transmitted infections, such as the virus that causes AIDS. PPFA provides, for example, specific instructions on how to use a condom. These instructions are accompanied by an illustration of a condom being placed on an erect penis.

225. PPFA provides general sexuality education information. PPFA provides, for example, requisite information about male and female genitalia and reproductive systems. This information is accompanied by descriptive illustrations. See PPFA exhibits in ACLU Plaintiffs' exhibit book.

226. PPFA also provides a range of information about abortion.

227. Through interactive computer services, including e-mail from its affiliates and questions and comments from e-

mail service users, PPFA also receives information regarding performing and obtaining abortions, practices to reduce unintended pregnancies and sexually transmitted infections and sexuality information generally.

228. The PPFA Web site presents a user with some general information and a menu of specific topics. Specific information is accessed by choosing a topic and then selecting sub-topics. PPFA's Web site is linked to several other Web sites, including some operated by its affiliates, that provide additional information on the topics covered on the PPFA site.

III. ALA PLAINTIFFS

A. AMERICAN LIBRARY ASSOCIATION/ FREEDOM TO READ FOUNDATION

229. The American Library Association ("ALA") and Freedom to Read Foundation ("FTRF") both have offices at 50 East Huron Street in Chicago, Illinois. The ALA is the organization which represents libraries and librarians throughout the United States. As of January 31, 1996, ALA's membership includes approximately 58,000 members, with more than 44,000 working librarians. ALA's members are in public libraries, academic libraries, special libraries, school libraries and media centers all over the United States. The ALA was founded in 1876. ALA is a non-profit, educational organization which describes itself as committed to the preservation of the American library as a resource indispensable to the intellectual, cultural, and educational welfare of the Nation.

230. FTRF is a non-profit membership organization established in 1969 by the American Library Association. The FTRF describes its purposes as promotimg and defending free speech.

231. ALA's members are primarily librarians, professionals dedicated to enhance the ability of their patrons to access information. Many libraries offer their patrons access to the Internet through facilities located in libraries, where patrons can access information posted on the Internet by third parties. Data compiled by the Public Library Association ("PLA") in 1995 indicates that for the 468 public libraries serving populations of 100,000 or more (which libraries serve over 57% of the United States population), 23.3% offer Internet access directly to patrons and 28.2% offer Internet access to patrons with a staff intermediary. *See* Plaintiffs' Exhibit 226. Additionally, according to the PLA, 67% of all academic libraries provide access to the Internet for faculty and students.

232. Many libraries have their own World Wide Web sites on the Internet and post their own material or offer patrons links to other World Wide Web sites. Such libraries may post materials such as their card catalogues, information about current events, textual information or art, or other materials from their library collections where licensed or permitted to do so under copyright law, or may sponsor "chat" groups. Such information is accessible by patrons with access to the Internet.

233. Libraries with their own Web sites may post their entire card catalogues online. For example, the online catalogue of the Fort Vancouver Regional Library in Fort Vancouver, Washington (http://www.fvrl.org), includes titles of popular works, such as NO SHIT, THERE I WAS, edited by Michael Hodgson, which is a collection of short stories about the outdoors; HOW TO SHIT IN THE WOODS, by Kathleen Myer, which is a book about the environment; and FUCK YES, by Wing Fing, which is a philosophy book.

234. Libraries or academic institutions with Web sites may also post or offer access to art posted on the Internet. For example, famous nude works by Botticelli, Manet, Matisse,

Cezanne and others can be found on the Internet, and are marked as Plaintiffs' Exhibit 228.

235. Libraries with Web sites may provide access to information that relates to medical and sexual topics. For example, the "Internet Public Library" compiled by the University of Michigan Library contains information on contraception, the proper use of condoms, AIDS information, and information about other sexually transmitted diseases. It can be found at http://ipl.sils.umich.edu, and is marked as Plaintiffs' Exhibit 230.

236. Libraries with Web sites may offer access to information on entertainment and news. For example, one library's Web site offers the text of a skit by Monty Python, a popular group of performers from England, which contains words such as "piss-ant," and can be found at http://ipl.sils.umich.edu/ref by moving to ocf.berkely.edu/70/00/library/monty-python/bruce, marked as Plaintiffs' Exhibit 231.

237. The ALA and its members have adopted the "ALA Library Bill of Rights," whose policies extend to information available through electronic means. A copy of the "ALA Library Bill of Rights" is marked as Plaintiffs' Exhibit 232. On January 24, 1996, the ALA Board adopted "Access to Electronic Information, Services, and Networks: an Interpretation of the LIBRARY BILL OF RIGHTS," marked as Plaintiffs' Exhibit 233.

B. AMERICA ONLINE, INC.

238. America Online, Inc. ("AOL") is a commercial online service provider with offices in Jacksonville, Florida, Oklahoma City, Oklahoma, Ogden, Utah, and Vienna, Virginia. Founded in 1985 and headquartered in Vienna, Virginia, AOL creates interactive services for the U.S. and international markets by developing "electronic communities" to meet the needs of the mass market. Incorporated in Dela-

ware, AOL has in excess of 4000 employees worldwide. AOL, in a joint venture with Bertelsmann AG, launched its European services in 1995 and its Canadian service in 1996.

239. AOL provides its members with its own online content in addition to a range of Internet services. AOL's subscribers retrieve, post, transmit, download, and forward material from the AOL online service and the Internet, including newsgroups and Web sites around the world. AOL's subscribers use the service, and its access to the Internet, to send e-mail, hold online conferences, "chat" in "real time," exchange software, take classes, shop, and create their own Web pages.

240. AOL states that it has tripled its membership over the last year, from 1.5 million subscribers in January 1995 to over 5 million. Most AOL members dial a local access number to connect to the service. A monthly fee of $9.95 provides access to all of AOL's services, including Internet access, for up to five hours each month. Each additional hour of use is charged at $2.95.

241. AOL's service includes over 6000 bulletin boards plus numerous USENET groups from the Internet. Each bulletin board is typically based on a general topic. Every bulletin board can accommodate up to 50 folders. Each folder covers a more specific topic. Each folder can accommodate up to 500 postings. AOL states that approximately 10 million messages are posted on AOL bulletin boards at any given time. Anyone logged on to AOL has the capacity to post or read a bulletin board message. Some bulletin boards are moderated for content; many are not. Messages posted to AOL's bulletin boards are available to all AOL members for viewing.

242. AOL's service includes many "chat rooms" on a range of topics. The topics may be created by members, by AOL, or by third-party content providers. The chat areas operate

like electronic conversations. An online user types in a statement, and it is transmitted to the other members who have entered the chat room. Anyone logged on to AOL has the capacity to participate in a chat room.

C. SOCIETY OF PROFESSIONAL JOURNALISTS

243. The Society of Professional Journalists (the "Society") is a voluntary, non-profit organization of nearly 14,000 members nationwide. Its headquarters are in Greencastle, Indiana. The Society is the largest and oldest organization of journalists in the United States, representing every branch and rank of print and broadcast journalism, including student journalists, professional journalists, and journalism academicians. In existence for over 80 years, the Society describes its purpose as dedicated to perpetuating a free press and to educating its members about the First Amendment and other issues affecting the journalism profession.

244. The Society and its members are participants and providers of information on the Internet. The Society operates a Web page providing general announcements of the Society's activities, including the posting of press releases about the Society's activities, notices of upcoming events, and highlights of upcoming issues of the Society's magazine, Quill.

245. The Society, through its members, also operates a listserv called "SPJ-L," a forum among more than 1,000 Internet users (both Society members and non-members) from roughly 25 countries to discuss and debate primarily journalism-related issues. The Society does not edit these messages for content.

246. The Society, through its members, operates a second listserv called "SPJ-C." Like SPJ-L, SPJ-C is a forum for members and non-members to discuss and debate primarily

journalism-related issues. SPJ-C, however, is geared primarily to the Society's members who are students at our nation's colleges and universities. The Society does not edit messages posted on SPJ-C for content.

247. The information provided by the Society on SPJ-L and SPJ-C is available free of charge through the Internet. As journalists, the Society s members write news stories, articles and columns made available over the Internet and other interactive computer networks.

D. SURFWATCH, INC.

248. SurfWatch Software, Inc. is a privately held software development company based in Los Angeles, California. SurfWatch currently employs 15 people.

249. SurfWatch was founded in January, 1995, by Mr. Duvall, his wife Ann Duvall, and Jay Friedland. The first product the company developed is their namesake product, SurfWatch.

250. In 1969, Mr. Duvall wrote the software (RFC 2) which enabled the first communications over the ARPAnet (the ancestral Internet).

E. MICROSYSTEMS SOFTWARE, INC.

251. Microsystems Software, Inc. is a privately-held company based in Framingham, Massachusetts. Founded in 1989, the company develops and markets Internet and productivity software. In 1995, Microsystems ranked number 223 on the Inc. 500 list of fastest growing privately-held companies. Microsystems employs 55 full-time employees.

252. Microsystems products include (1) HandiWARE, which was developed to enable persons with disabilities to interface with computers; (2) CaLANdar, a calendar/ scheduling program; and (3) Cyber Sentry, which allows

private, Local Area Network managers to monitor the number of software licenses in use at a particular time.

F. RECORDING INDUSTRY ASS'N OF AMERICA, INC.

253. The Recording Industry Association of America, Inc. ("RIAA") is a non-profit trade association whose member companies produce, manufacture and distribute over 90% of the sound recordings sold in the United States.

254. RIAA represents over two hundred record companies who together produce the vast bulk of recorded music in the United States. Many RIAA member companies market their copyrighted works online through World Wide Web sites which typically include material such as lyrics, sound and video clips, and biographical information on artists.

G. ASSOCIATION OF RESEARCH LIBRARIES

255. The Association of Research Libraries ("ARL") is a not-for-profit association founded in 1932, and states that its mission is to shape and influence the future of research libraries in the process of scholarly communication. ARL is comprised of 119 libraries serving every major North American research institution and operates as a forum for the exchange of ideas. The membership of ARL includes university libraries; large, research-oriented public libraries; and certain government libraries.

256. ARL member institutions make no-cost or low-cost online access to information available to their patrons, faculty, and staff. These institutions provide e-mail, gopher and World Wide Web access to their patrons.

257. ARL member institutions also contribute to the resources available on the Internet.

H. PEOPLE FOR THE AMERICAN WAY

258. People For the American Way (PFAW) is a District of Columbia non-profit organization with offices in Washington, D.C., New York, New York, Los Angeles, California, Atlanta, Georgia, Boulder, Colorado, Indian Rocks Beach, Florida and Austin, Texas. PFAW was founded in 1980, and has more than 300,000 members nationwide including parents, teachers, librarians, Internet users, business people and others. A copy of PFAW's mission statement is marked as Plaintiffs' Exhibit 282.

259. Since its inception PFAW has communicated with its members and constituents through the use of direct mail, issuance of reports, papers and our newsletter, and through exposure in the media. In the last year, the Internet has become a principal means of communication for PFAW.

260. PFAW's Web site was started in January, 1996. In addition, the "Expose the Right Campaign," a project of PFAW and People For the American Way Action Fund, started a separate Web site in January, 1996. PFAW staff and members also utilize Internet resources, such as e-mail, listservs and the World Wide Web.

I. NEWSPAPER ASS'N OF AMERICA

261. The Newspaper Association of America (NAA) is a Virginia non-profit organization headquartered in Reston, Virginia with offices in Washington, New York, Chicago and Detroit. NAA was formed June 1, 1992, with the merger of the American Newspaper Publishers Association, the Newspaper Advertising Bureau and several other newspaper marketing organizations. NAA members include more than 1,500 newspapers in the United States and Canada. NAA members account for approximately 85 percent of the daily newspaper circulation in the United States. In January 1996, NAA launched a New Media Federation for newspaper professionals with an interest in new media issues, as a resource for electronic news and information. More than 175 of NAA's member newspapers are currently involved with developing and distributing content on the Internet. Newspapers with Internet-based services range from small weeklies with circulations under 10,000 to major metropolitan newspapers with circulations over 1 million.

262. Newspapers provide electronic versions of their printed product on Web sites and through special forums set up by commercial online service providers. The electronic version of the printed newspaper may include the current issue and archived issues. –In addition, content offered online may include news and information from wire services and syndicates, original content developed for the electronic service, content from local third-party providers, classified advertisements, display advertising and user-generated content from messaging services such as message boards, "real-time chat" and e-mail communications. The Web sites of NAA members usually are linked to NAA's own Web site.

263. Newspapers make their online services available through a variety of means, including free services, subscription-based services, premium-priced features and advertiser-supported services. Most newspapers available on commercial online services (America Online, CompuServe, etc.) do not charge extra (beyond the charges from the online service provider) for access to the basic electronic product. Most newspapers with Web sites also do not charge subscriptions for their online resources, which are available to users with access to the Internet. About 60 newspapers are also Internet service providers in their communities, selling subscriptions for Internet access. Some such newspapers have established electronic forums for local communities to communicate and to conduct business.

264. Several newspapers host content from other providers (e.g. The Boston Globe site includes content from several

radio and TV stations, museums, weekly newspapers, etc.); lease space on their Web servers to other companies (e.g. the News and Observer also hosts sites for the Poynter Institute and the Freedom Forum); or offer consumers the ability to create and store their own home pages on the newspaper's site (e.g. Evansville Courier).

J. THE UNIVERSITY OF CALIFORNIA SANTA BARBARA LIBRARY

265. The University of California, Santa Barbara (UCSB), is one of nine campuses of the University of California.

266. The UCSB Library serves as the primary library for approximately 1,000 faculty members, 2,500 staff members, and over 18,000 students.

267. The Library states that its role is to meet the information needs of this community, including providing Internet access.

268. The UCSB Library provides access to the Internet, including the World Wide Web, e-mail, and gopher services, for its students, faculty, and staff. UCSB Library states its policy is to provide free access to these services. In addition to providing Internet access, librarians instruct students, faculty and staff how to access and use Internet services such as e-mail, gopher, and the World Wide Web.

269. Some faculty members assign reading assignments to students by informing students where the required material can be found on the Internet, via library links to textual databases. Some of the titles that students have been asked to access in this fashion include *Archives of Sexual Behavior*, *Lambda Book Report*, and *Sex Roles: A Journal of Research*.

270. The University has a campus Web site. Any campus department or unit can develop its own home page and have

it linked to the campus site. Similarly, almost all departments have established gopher servers. The homepages of the university's art history and studio art programs include faculty and student exhibits on their Web pages, and these sometimes include depictions of nudes. They are accessible to anyone with access to the World Wide Web.

271. The USCB Library estimates that of the approximately 5,000 freshman on campus, 1,000 to 1,500 are not yet eighteen years old.

K. COMPUSERVE INC.

272. CompuServe Incorporated ("CompuServe") is an Ohio corporation with its principal place of business in Columbus, Ohio. CompuServe provides proprietary online information access services to its customers, provides access to the Internet, including USENET newsgroups and World Wide Web sites, to individuals and corporations worldwide, and provides network services to corporations that wish to use CompuServe's secure network for transmitting data worldwide. CompuServe and its licensee together had approximately 4.2 million subscribers as of January 31, 1996. This is an increase of 56% since January 1995.

273. CompuServe provides access for its users over its network and by providing them with software that allows access to CompuServe's services. Connection to CompuServe is made via modems and home computers. CompuServe's subscribers pay a monthly membership fee of $9.95 for access to virtually all of CompuServe's services. Membership includes, among other things, five free hours of connect time. An additional hourly fee of $2.95 applies for time in excess of five hours. This is the standard plan; other pricing arrangements are offered as well. CompuServe also provides Internet-only service for a monthly fee of $19.95, which includes unlimited hours of Internet use.

274. CompuServe features hundreds of distinct areas on its online service called "Forums" (a registered trademark of CompuServe, Inc.). Each Forum area is dedicated to a particular subject. Subscribers can post images, messages, and other content relevant to the topic and read messages posted by other subscribers. Many messages are posted to CompuServe Forum areas each day.

275. CompuServe also provides within these Forum areas electronic "chat rooms." Chat rooms are initiated both by independent Forum Managers, who manage the various Forums under contract with CompuServe, and by CompuServe's subscribers themselves. CompuServe offers parental controls free of charge to its subscribers.

L. COMMERCIAL INTERNET EXCHANGE ASS'N

276. Commercial Internet eXchange Association ("CIX") is a not-for-profit trade association incorporated under the laws of the state of Delaware and having its principal place of business at 1039 Sterling Road, Suite 201, Herndon, VA 22070. CIX is comprised of commercial Internet access providers. CIX presently consists of over 100 domestic members and over 50 international members, including major market participants as well as small entrepreneurs. CIX's domestic members comprise over 75% of the nation's leading commercial Internet access providers.

277. CIX states that its goals include to facilitate global connectivity among commercial access providers, to further the development and use of the Internet, and to promote environments for Internet commercialization.

M. NETCOM ONLINE COMMUNICATION SERVICES, INC.

278. NETCOM On-Line Communication Services, Inc. ("NETCOM") is incorporated in Delaware and maintains its

executive offices in San Jose, California. NETCOM's principal business is providing dial-up accounts for individuals and high-speed dedicated connections for businesses.

279. NETCOM operates its own high-speed, digital network and provides direct access to Internet applications and resources, including e-mail, NetNews, and World Wide Web services, for more than 300,000 subscribers. NETCOM's network is comprised of leased high-speed dedicated lines and over 200 points-of-presence in metropolitan areas in more than 40 states, with 800 number access in areas where there is no local access.

280. Many of NETCOM's subscribers connect with the Internet using NETCOM's NetCruiser software, which includes an interface that introduces Internet information by subject area and provides several search tools for access to the Internet. A NETCOM subscriber can obtain access to the Internet, as well as its commercial applications, for a monthly subscription fee.

N. THE ASS'N OF AMERICAN UNIVERSITY PRESSES, INC.

281. The Association of American University Presses, Inc. (AAUP) is a New York State not-for-profit organization with offices in New York City. AAUP was created in 1937 to assist member presses in carrying out their educational objectives with economy and efficiency. AAUP provides its 114 members with cooperative marketing services, professional development programs, statistical analyses, organizational and public relations representation, and professional publications. A copy of AAUP's member list is marked as Plaintiffs' Exhibit 205.

282. AAUP members publish approximately 18% of the books published in the United States each year and over 700 journals. Members of AAUP follow an independent peer

review system for the works they publish.

283. AAUP states its members are developing publication options that utilize the Internet. Currently, AAUP maintains a comprehensive online catalogue, and certain journals published by AAUP members are available on the Internet.

O. PRODIGY SERVICES COMPANY

284. Prodigy Services Company is a provider of online and Internet access services, with offices in New York City, White Plains, and Yorktown Heights, New York. Prodigy was originally founded in 1984 to develop and market the PRODIGY service, an online network featuring news, weather, sports and financial information; reference and educational materials; online shopping; travel reservations; banking and brokerage; and public and private communications in the form of bulletin board, "chat rooms," and e-mail.

285. Prodigy also provides access directly to the Internet, with its World Wide Web, USENET newsgroups, and Internet e-mail. In addition to providing those linkages as an integrated part of the PRODIGY service, Prodigy also markets an Internet-only service, where consumers connect to the Internet, but do not purchase access to the PRODIGY service.

286. Depending on the originating source, Prodigy retrieves, stores and delivers information and communications in different ways. Prodigy owns and operates a proprietary network composed of mainframe storage and processing computers connected to several hundred minicomputers (servers) in local calling areas around the country. Some editorial content, bulletin boards, and subscriber e-mail is stored on Prodigy's mainframe computers until consumers request it. Prodigy also provides access to news feeds, stock quotes and the Internet. In the case of frequently requested Web sites, Prodigy often caches (temporarily stores) the information on

its own mainframes to enhance performance and speed up delivery of content to the end user. Frequently requested content is also "pushed out" over the network to reside closer to the user on Prodigy's minicomputers, also for performance reasons. E-mail and bulletin boards are never stored anywhere other than Prodigy's mainframes.

P. AMERICAN SOCIETY OF NEWSPAPER EDITORS

287. The American Society of Newspaper Editors ("ASNE") is a nonprofit professional membership organization of nearly 900 individuals who hold positions as directing editors of daily newspapers throughout the United States. Many of the daily newspapers which are currently edited by ASNE members in print form are now, or will soon be, published in electronic version available to the public on the Internet, the World Wide Web and other online computer services. Currently, ASNE members hold editorial positions on more than 100 of approximately 175 daily newspapers in North America that have been identified this month by the Newspaper Association of America as being available online. Some of these services are accessible only through proprietary commercial online service providers such as America Online, Prodigy and CompuServe, while other newspapers have established their own Web sites.

288. The principle work of ASNE members involves making editorial decisions regarding what content will be published in the daily editions of their newspapers. The contents of daily newspapers varies from one publisher to the next, but typically includes news reports, commentary material, opinion pieces and advertisements -- together with accompanying photographs and graphic illustrations -- concerning a range of subject matter.

Q. MEDIA ACCESS PROJECT

289. Media Access Project (MAP) is a 24 year-old public interest telecommunications law firm organized as a not-for-profit corporation. MAP is exempt from Federal income tax under Section 501(c)(3) of the Internal Revenue Code. MAP's policy statement is marked as Plaintiffs' Exhibit 270.

290. MAP maintains a "page" on an Internet World Wide Web site operated by another public interest organization, Essential Information. Its location is http:\\www.map@essential.org. MAP's staff utilizes Internet resources, such as e-mail, listservs and the World Wide Web. MAP's staff attorneys also participate in discussion groups conducted by Counsel Connect, an online service for attorneys.

291. MAP's Executive Director has been a "panelist" in an online seminar on the Telecommunications Act of 1996 conducted on Counsel Connect. The operators of Counsel Connect maintain a separate "Web Site" on the World Wide Web; much of the online seminar was also posted on the Internet through that mechanism. MAP's attorneys have also engaged in online discussion in various online fora of the candidate speech at issue in *Becker v. FCC*, Civ. Action Nos. 95-1048, 95-1056 (D.C. Circuit).

R. INTERACTIVE SERVICES ASSOCIATION

292. The Interactive Services Association (ISA) is a District of Columbia non-profit association with offices in Silver Spring, Maryland. ISA was founded in 1981 as the Videotex Industry Association (VIA). In January 1992, the VIA changed its name to the ISA. Today, the ISA has 350 members from a variety of large industries in the United States including advertising, cable, computer, consumer electronics, financial services, magazine and newspaper publishing, and telephone. A minority of ISA members are

small entrepreneurs in the interactive services business. ISA members include content providers and developers, online services, Internet access providers, and hardware and software manufacturers. The majority of ISA's members are providing online or Internet services and products. Some members provide interactive telephone, interactive television, and screen telephone product and services.

293. ISA states that its primary purpose is to promote the growth and development of all forms of personal interactive services, including providing members with networking and educational services.

294. ISA members include America Online, CompuServe, Prodigy and Microsoft Network, and Netcom. ISA content provider members include local information services from national newspapers, local community services, and special interest services such as those for senior citizens and physicians.

295. In addition to providing their own content, ISA members provide applications such as e-mail, bulletin boards and chat.

296. In November 1994, the ISA, with the cooperation of the National Center for Missing and Exploited Children and with the financial support of major commercial online services, published "Child Safety on the Information Highway," a brochure advising parents on how their children can avoid inappropriate content & services. The contents of this brochure is available on the major online services and the World Wide Web which includes the ISA's home page http://www.isa.net. ISA estimates that over a half a million copies of the brochure have been distributed to consumers since its release both through online and in hard copy distribution. A copy of the brochure is marked as Plaintiffs' Exhibit 271.

S. MICROSOFT CORPORATION

297. The Microsoft Network ("MSN") is an Internet-based online service providing access to the Internet. MSN members can also access multi-media content properties unique to MSN, use editorially guided Internet navigation tools, and interact with a large MSN "community" of members and Independent Content Providers. MSN membership exceeds 850,000. MSN provides dialup access from fifty countries on six continents worldwide and will soon be available to customers already on the Internet.

298. MSN provides its members access to the Internet, including the World Wide Web, Usenet, and newsgroups, as well as to the material of independent content providers which may be available only to MSN subscribers. Members can also access content (or will soon be able to access content) from Microsoft Corporation (such as Cinemania, Music Central, CarSource, MSN News and an online Encarta encyclopedia) or from joint ventures Microsoft has with others, such as the MSNBC joint venture with NBC News, a joint venture Microsoft has established with Black Entertainment Television, and other content partners such as Paramount's Star Trek and Entertainment Tonight. Some of this content can be, or in the future may be, accessed through the Internet.

299. MSN seeks to provide "screening" capabiliites for certain Usenet adult content newsgroups, and expects that additional parental "screening" technology will soon be available. Microsoft is a part of an industry-wide effort called the Platform for Internet Content Selection (PICS), to provide technological standards for rating and screening content. On February 28, 1996, Microsoft announced that it is working with the Recreational Software Advisory Council (RSAC) in connection with an initiative to rate content on the Internet.

300. Microsoft employees and MSN members are also users

of the Internet. Many of them communicate by email, and post messages to lists and bulletin boards.

301. Microsoft Corporation also provides the Microsoft Internet Explorer, a browser software product for exploring and navigating the Internet. Through its newly-formed Internet Platform and Tools Division, and in its other Divisions, Microsoft provides or is developing other software for accessing the Internet, for establishing and maintaining Internet servers and related services, and for creating Web sites and other Internet content.

T. AMERICAN BOOKSELLERS ASSOCIATION/ AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION

302. The American Booksellers Association ("ABA") was organized in 1900 and is an association of general interest bookstores in the United States. ABA has over 5500 members, including 4300 bookstores who do business in over 6000 locations.

303. Some ABA members are users of the Internet. Over 100 ABA member bookstores currently have active World Wide Web sites. A list of the bookstores is marked as Plaintiffs' Exhibit 258. The most recent list is available at http://www.bookweb.org/bookweb/sellerlist/sellera.html. Some bookstores only operate an electronic site on the Internet, for example Amazon (http://www.amazon.com); Dial-a-Book (http://www.psi.net/DialaBook); Bookstacks Unlimited (http://www.books.com); and Open Book Systems (http://www.obs.us.com).

304. Online bookstores use their Web sites to list and sell books. They also use their Web sites to promote events, advertise book signings and to share information with other bookstores about various titles.

305. Online ABA bookstore members often offer links

through their homepages to the Web sites of publishers, where Internet users can see excerpts of books. An excerpt from the book PRIMARY COLORS, which appears on the World Wide Web site of Random House is marked as Plaintiffs' Exhibit 259. Other bookstores, such as Printer's Inc., also provide excerpts from books. An excerpt is marked as Plaintiffs' Exhibit 260.

306. Many bookstores use their Web sites to list their available titles.

U. ASSOCIATION OF AMERICAN UNIVERSITIES

307. The Association of American Universities (AAU) is a Washington, D.C., not-for-profit higher education association, representing 60 major public and private research universities with strong programs of academic research and graduate and professional education. The American Association of State Colleges and Universities (AASCU) is an organization of more than 400 public colleges and universities and systems across the United States and in Puerto Rico, Guam, and the Virgin Islands. The National Association of State Universities and Land-Grant Colleges (NASULGC), the oldest higher education association in the United States, has 181 member institutions and works to support the contributions that state and land-grant universities make through teaching, research, and public service. The member institutions are represented in each of the aforementioned associations by the presidents and chancellors of those institutions.

308. AAU, AASCU and NASULGC state that they address institutional and national issues affecting undergraduate, graduate, and professional education, and academic research and scholarship. Many of AAU member colleges and universities provide access to the Internet to students and faculty.

V. WIRED VENTURES, LTD.

309. Wired Ventures, Ltd. publishes *Wired*, a monthly magazine that reports on the impact of new technologies on our society. *Wired* has a circulation of over 300,000. Copies of the cover and table of contents of the March 1996 issue as they appear online are marked as Plaintiffs' Exhibit 248.

310. In addition to being distributed in printed format, the editorial content of *Wired* is available on the Internet through HotWired (a news and entertainment service on the World Wide Web) and America Online. Copies of the listing of *Wired*'s editorial content as it appears on HotWired is marked as Plaintiffs' Exhibit 249.

311. *Wired*'s February 1994 issue included an investigative report on government's increasing ability to use computerized driver's license data for such purposes as collecting unpaid taxes, entitled "Nobody Fucks with the DMV." A copy of the article as it appeared through HotWired is marked as Plaintiffs' Exhibit 250.

312. In its June 1994 issue, *Wired* reported on the online "alternative newsgroup" "alt.sex.bondage." A copy of the article as it appeared through HotWired is marked as Plaintiffs' Exhibit 251.

313. *Wired* also publishes articles on cyberspace-related issues. *Wired* currently relies on HotWired and other online services to provide Internet users with access to *Wired*.

W. OpNET INC.

314. OpNet Inc. is a Pennsylvania for-profit corporation located in Bryn Mawr, Pennsylvania. OpNet was founded in 1995, and states that its purpose is to provide complete Internet services, including access to the Internet and Web page hosting. OpNet's customers include both individuals and small businesses throughout the suburban and downtown

Philadelphia area.

315. OpNet's customers receive Internet access via dialing modem connections and/or dedicated telecommunication lines for a flat monthly fee, and not an hourly or usage based fee.

316. Also for a flat monthly fee, OpNet rents space on its server to customers for their Web pages. As Web page services required vary significantly from customer to customer, the pricing varies accordingly.

X. CENTER FOR DEMOCRACY AND TECHNOLOGY

317. The Center for Democracy and Technology (CDT) is a non-profit public interest organization based in Washington, D.C. CDT was founded in December of 1994. CDT states that its mission is to develop and advocate public policies that enhance democratic values and constitutional civil liberties in new communications technologies.

318. CDT relies on the Internet as its primary means of information dissemination, public education and grass-roots outreach. Its newsletter, CDT Policy Post, is published exclusively in electronic form and distributed via the Internet. CDT position papers, analysis of legislation and regulatory proposals, and other information are made available to Internet users, free of charge, on CDT's World Wide Web page and ftp archive.

319. CDT maintains a World Wide Web site ttp://www.cdt.org/) and an ftp (ftp://ftp.cdt.org/) site. CDT also maintains a news publication which it states is received by over 9000 Internet users. CDT staff participate in online discussion groups, public mailing lists, and respond to private electronic mail.

320. CDT's World Wide Web site contains CDT position

papers, analysis of legislation and regulatory proposals, and links to other sites with information related to the Internet, civil liberties issues, and other information. CDT also utilizes its World Wide Web site to conduct political organizing.

321. CDT's principle news publication, CDT Policy Posts, is published only in electronic form. Individuals can subscribe to CDT's Policy Post distribution list free of charge by sending a message to an electronic mail address. In addition, readers may access issues of CDT's Policy Post via Usenet newsgroups, public mailing lists, the World Wide Web, ftp or gopher archives. Subscribers include individual Internet users, Congressional and Executive branch staff, press, industry leaders.

322. CDT also sends its Policy Posts to other open, public channels on the Internet such as Usenet newsgroups and open lists maintained by third parties.

323. In addition to its online news publication, CDT staff regularly post messages to a variety of public mailing lists, Usenet newsgroups, and online chat sessions.

Y. HOTWIRED VENTURES, LLC

324. HotWired Ventures, LLC produces HotWired, a news and entertainment service on the World Wide Web (available at http://www.hotwired.com) offering interactive information about culture, lifestyle, politics and technology without charge. A copy of HotWired's Overview page is marked as Plaintiffs' Exhibit 261.

325. HotWired has produced a feature on the poetry of Allen Ginsberg; an illustrated feature entitled "Quest For Fire," about the "Burning Man" festival, and a critique of *Time* magazine's story on "Cyberporn." Copies are marked as Plaintiffs' Exhibits 262 and 263.

326. One of HotWired's regular sections is called Piazza, an interactive discussion area.

Z. THE HEALTH SCIENCES LIBRARIES CONSORTIUM

327. The Health Sciences Libraries Consortium ("HSLC") is a regional library organization of nearly 600 institutional members dedicated to cooperative library resource sharing and access to electronic information. Among the HSLC's members are colleges of pharmacy and drug manufacturing and research firms. The offices of HSLC are located at University City Science Center, 3600 Market Street, Suite 550 in Philadelphia, Pennsylvania. The HSLC is incorporated in Pennsylvania and has its principal place of business in Philadelphia. The Internet addresses of the HSLC are http://www.hslc.org and http://telnet.hslc.org.

328. The HSLC states that its primary focus is serving the information needs of academic, medical and health sciences libraries. In addition, the HSLC provides access to a range of library and electronic information resources in a variety of subject areas to public and school libraries. Since 1993, the HSLC has made available its own online resources as well as access to the Internet, primarily in the health sciences areas.

329. The HSLC maintains its public online resources through its own servers and internal network, to provide Internet interconnectivity including access to the World Wide Web and most other Internet protocols such as electronic mail and chat services. The HSLC publishes information on its Web pages related to its service offerings and provides links to local and international information resources through its "menu" system.

330. The HSLC's menu system is accessible by individuals through the HSLC membership of the institution with which

the individuals are affiliated. In addition, institutional members may elect to make access available from public terminals which enable individuals without access accounts to obtain HSLC's resources.

331. The HSLC hosts unmoderated online discussion groups on a variety of health and non-health topics. The HSLC also provides access to a large number of unmoderated discussion groups located elsewhere on the Internet. Some of these discussion groups address issues in health and non-health related areas and may contain sexual content, descriptions of the human body, human reproduction, and diseases of the human reproductive system. One example is marked as Plaintiffs' Exhibit 257. Some postings within news and discussion groups contain attached electronic files which with appropriate software may be translated into on-screen images by users.

332. The HSLC also provides information on the HIV virus and the transmission of AIDS. One example is marked as Plaintiffs' Exhibit 257.

IV. ALA DECLARANTS FOR THE PRELIMINARY INJUNCTION HEARING TO BE HELD ON MARCH 21 AND 22, 1996

333. Robert Croneberger is the Director of the Carnegie Library of Pittsburgh, with offices at 4400 Forbes Avenue, Pittsburgh, Pennsylvania.

334. The Carnegie Library of Pittsburgh was established in 1895. The library makes no distinctions between patrons on the basis of age. For example, the library does not offer separate library cards for adults and children.

335. The Carnegie Public Library of Pittsburgh has two World Wide Web servers on the Internet: http://www.clpgh.org and http://trfn.pgh.pa.us. The library offers pa-

trons access to the catalog, various information lists and news about current events. Additionally, the Carnegie Library of Pittsburgh hosts at one of its Web sites the text of a study entitled "Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces, and Territories" prepared by Martin Rimm, Principal Investigator.

336. The Library's catalog is posted at its Web site to permit patrons to search the collections available at the library and request material from the library. Titles include: (1) SO FUCKING WHAT? by A.M. Wellman (Random House, 1990); and (2) THE ICE OPINION: WHO GIVES A FUCK? by Ice-T (as told to Heidi Siegmund)(St. Martin's Press, 1994). These titles can be found at the Library's Web site, located at http://www.clpgh.org.

337. The full text of the study "Marketing Pornography on the Information Superhighway" is located at http://trfn.clpgh.org/guest/mrtext.html. The Carnegie Library of Pittsburgh makes the study available for research and analysis. The study has been accessed by many users. The study contains descriptions of the sexual images the study's investigator found.

V. ALA DECLARANTS NOT TESTIFYING

A. THE FORT VANCOUVER REGIONAL LIBRARY

338. The Fort Vancouver Regional Library, located at 1007 East Mill Plain Boulevard, Vancouver, Washington, is a member of the American Library Association. The Fort Vancouver Regional Library, established in 1950, covers 4,200 square miles in SW Washington State. It serves over 310,000 people residing in eleven cities, and numerous unin-

corporated rural communities in 3 counties. The library states that its goal is to provide a wide array of information to its patrons. The library has used an interactive computer service to offer patrons access to the card catalog, the American Heritage Dictionary, Books in Print, Contemporary Authors. Fort Vancouver Regional Library leases the texts of these magazines and online resources.

339. The information in the Fort Vancouver Regional Library catalog is available to library patrons, members of the PORTALS Consortium in the states of Washington and Oregon and anyone else with knowledge of the Library's Internet address. The PORTALS Consortium consists of 18 libraries in the Portland/Vancouver metropolitan area. In addition, the Fort Vancouver Regional Library has just completed development of its own World Wide Web site on the Internet. The Web site includes information about the Library, such as branch hours, and links to other World Wide Web sites.

340. The library's card catalog also is available via the Internet to enable patrons to locate resource materials, identify the availability of material at a particular library location and request material from the library. Titles include NO SHIT, THERE I WAS, edited by Michael Hodgson (ICS Books, 1994)(a collection of short stories about the outdoors); HOW TO SHIT IN THE WOODS, by Kathleen Myer (Ten Speed Press, 1989)(a book on protecting the environment for mountaineers); FUCK YES, by Wing Fing (Shepherd Books, 1988)(a philosophy book); and ICE OPINION: WHO GIVES A FUCK?, by Ice T (St. Martin's Press, 1994) (an interview with a rock star). These titles can be found in the Library's catalog, which is located via telnet command at fvrl.lib.wa.us.

341. The Fort Vancouver Regional Library has also purchased the rights to the texts of over 800 magazines and the index of approximately 700 others. Thus patrons access the

full texts of magazines such as Psychology Today, Cosmopolitan, Redbook and others. *See* Plaintiffs' Exhibits 223, 224 and 225. The library's magazine database offers patrons access to full text articles on a variety of subjects.

B. BANTAM DOUBLEDAY DELL PUBLISHING GROUP, INC.

342. Bantam Doubleday Dell Publishing Group, Inc. ("BDD") is a publishing company with its principal offices located in New York, New York. BDD's parent company is Bertelsmann, A.G., a worldwide media company. BDD is a member of the Association of American Publishers, Inc. ("AAP"), the major trade association of United States book publishers.

343. BDD publishes fiction and non-fiction works directed at all interests and age groups. BDD's authors range from Nobel Prize Laureate Naguib Mahfouz, and the world's bestselling novelists John Grisham and Danielle Steel to humorists Jerry Seinfeld and Al Franken. In 1995, BDD published more than 1000 new titles.

344. The preponderance of BDD's business today still entails the publication of hard- and soft-cover books in paper form, and their dissemination through wholesale and retail outlets. BDD is looking toward making its books available online.

345. BDD has developed a site on the Internet's World Wide Web, introduced in July 1995. BDD's home page, which is located at http://www.bdd.com, allows Internet users to access information about the following: new book releases; a weekly featured author entitled "A Visit With . . ."; and various topical areas of interest. *See* Plaintiffs' Exhibit 207. With regard to each newly released book, BDD's Web site provides the following: a picture of the book cover; a description of the book; a sample chapter; and

the ability for users to link-up to additional resources on the Internet that are related to the described book. Examples are marked as Plaintiffs' Exhibits 208-211. With regard to the featured authors, BDD's Web site offers: background information about the author; a description of various works by the author; an excerpt from the author's latest work; pictures of the book covers of those books discussed; the opportunity for users to send letters to the author; and the ability for users to link-up to additional resources on the Internet that are related to the author and/or the author's works. Examples are marked as Plantiffs' Exhibits 212-217. With regard to the topical areas of interest ("forums"), which focus on numerous topics, such as science fiction, business, and romance, BDD's Web site provides: ancillary materials pertaining to both books and authors; the ability and opportunity for users to speak with each other and various authors via bulletin boards; and the opportunity for users to sign-up for and receive monthly newsletters relating to the user's topic of interest. Examples are marked as Plaintiffs' Exhibits 218-221.

346. BDD, in conjunction with online services such as America Online, CompuServe, Prodigy and The Microsoft Network, also offers to its users an opportunity to participate in online chats, enabling users to "meet" authors and speak with them in "real time."

347. BDD's Web site offers content that caters to young readers from 4 to 18 years of age.

C. THE UNIVERSITY OF PENNSYLVANIA LIBRARIES

348. The University of Pennsylvania has offices at the Van Pelt-Dietrich Library Center, 3420 Walnut Street, Philadelphia, Pennsylvania. The University of Pennsylvania Libraries post material on their Web sites and offer access to Web sites that support the curriculum of the University. A sam-

ple index of material to which the library offers access through the Internet is marked as Plaintiffs' Exhibit 252.

349. The University of Pennsylvania offers its faculty, students and staff access to the Internet. Additionally, the University of Pennsylvania and the University of Pennsylvania Libraries have their own World Wide Web sites on the Internet. Much of the information placed on the Web sites of the University of Pennsylvania Libraries is accessible to users of the Internet, whether affiliated with the University or not.

350. Some information placed by the University of Pennsylvania on the Internet is available only to faculty, students and staff of the University of Pennsylvania. The library has, for example, purchased or leased for use the major databases in psychology and sociology. Classes at University of Pennsylvania in abnormal psychology access these databases to reference primary research literature in that field. These databases include research on pedophilia, prison behavior and interest in pornography. One example of this type of material is marked as Plaintiffs' Exhibit 253-254, the PsycInfo database accessible through the PennLin link on the Library's homepage: http://www.library.upenn.edu.

351. The University of Pennsylvania also offers an undergraduate class on sexuality. One example of online databases to support this class is marked as Plaintiffs' Exhibit 255, and may be located at http://abacus.oxy.edu/QRD (the "Queer Resources Directory").

352. The library also offers access for faculty and students to the database ARTFL through our homepage. This contains the primary text of many French texts, such as the text of Marquis de Sade's JUSTINE (1791), located at http://humanities.uchicago.edu/ARTFL/ARTFL.html. An excerpt is marked as Plaintiffs' Exhibit 256.

353. Some databases at University of Pennsylvania already

are restricted to faculty and students. Some students are under the age of eighteen.

D. THE FREE LIBRARY OF PHILADELPHIA

354. The Free Library of Philadelphia, with offices at 1901 Vine Street, Philadelphia, PA, was established in 1891 and offers its own World Wide Web site on the Internet. The library offers patrons access to its catalog and electronic databases.

355. The Library's catalog is posted at the Library's own Web site to enable patrons to locate resource materials and request material from the library.

356. Catalog titles include: Ice-T, THE ICE OPINION: WHO GIVES A FUCK? (1994); Jong, Erica, THE DEVIL AT LARGE: ERICA JONG ON HENRY MILLER. (1993) (Catalog entry carries a contents note which includes "Crazy cock in the land of fuck"). These titles can found at the Library's Web site, which is located at http://www.libertynet.org/--flp.

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Supreme Court, U.S.
FILED
NOV 25 1996
CLERK

No. 96-511

In the Supreme Court of the United States

OCTOBER TERM, 1996

JANET RENO, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL., APPELLANTS

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OPPOSITION TO MOTION TO AFFIRM AND REPLY TO RESPONSE TO THE JURISDICTIONAL STATEMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-511

JANET RENO, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL., APPELLANTS

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OPPOSITION TO MOTION TO AFFIRM AND REPLY TO RESPONSE TO THE JURISDICTIONAL STATEMENT

1. As we argue in our jurisdictional statement, because the decision below effectively invalidates provisions of an important Act of Congress, and is based on a faulty constitutional analysis, the Court should note probable jurisdiction of the present appeal pursuant to the express review provision set forth in Section 561(b) of the Communications Decency Act of 1996 (CDA), 110 Stat. 143. The responses filed by the American Library Association, et al. (ALA appellees) and the American Civil Liberties Union, et al. (ACLU appellees) only reinforce the conclusion that the Court should grant plenary review. The ALA appellees acknowledge (Resp. 3) that this case "raises important constitutional questions regarding the application of traditional First Amendment principles to a new and increasingly important medium of communi-

cation," and that it is a case "of first impression." The ACLU appellees agree (Mot. to Aff. 17-18) that this case "is an important one," and that it "is the first case presented to the Court that directly addresses the application of traditional free speech principles to the rapidly evolving medium of online communications." Those considerations alone are sufficient to warrant plenary review. Indeed, the ALA appellees acknowledge as much, stating that "we do not oppose the government's request for plenary review." ALA Resp. 3.

2. The ACLU appellees nonetheless contend (Mot. to Aff. 16) that the decision below is so clearly correct under this Court's precedents that summary affirmance is warranted. And while the ALA appellees do not urge summary affirmance on that ground, they similarly contend (Resp. 3) that the decision below is "plainly correct."

As we demonstrate in our jurisdictional statement, however, the district court erred in holding unconstitutionally vague the CDA's restrictions on indecent and patently offensive communications. This Court's decisions in *Miller* v. *California*, 413 U.S. 15 (1973), and *Denver Area Educational Telecommunications Consortium, Inc.* v. *FCC*, 116 S. Ct. 2374 (1996), demonstrate that the CDA's restrictions give sufficient warning concerning what they do and do not prohibit to satisfy the First Amendment and the Due Process Clause. J.S. 17-19.

Appellees' sole response to our attack on the district court's vagueness ruling is to urge the Court to affirm the district court's decision on other grounds. ACLU Mot. to Aff. 27-28; ALA Resp. 10 n.7. They offer no substantive defense of the district court's vagueness ruling.

3. As we show in our jurisdictional statement (at 19-21), the district court also clearly erred in holding that the prohibitions contained in Sections 223(a)(1)(B) and

223(d)(1)(A) are facially unconstitutional. Both of those prohibitions restrict the dissemination of patently offensive, sexually explicit material to a particular person or persons, knowing that the person is under 18 years of age; neither significantly interferes with adult-to-adult communication. In their responses, neither the ACLU appellees nor the ALA appellees contend that Sections 223(a)(1)(B) and 223(d)(1)(A) are facially unconstitutional if construed in the manner that we have suggested.

Rather than conceding that the district court erred in enjoining those prohibitions, however, appellees urge the Court not to consider that issue because the government did not argue below that Sections 223(a)(1)(B) and 223(d)(1)(A) have a narrower scope than Section 223(d)(1)(B). ALA Resp. 24-26; ACLU Mot. to Aff. 25-26. Appellees are incorrect. The government expressly made that argument in its post-hearing brief:

> Before discussing the application of the defenses in Section 223(e) of the Act, defendants must first note that there should be no question at all as to the constitutionality of sections 223(a)(1)(B) and 223(d)(1)(A). Both provisions involve the *knowing* transmission of indecent material to a specific person under 18 (which differs importantly from section 223(d)'s prohibition, discussed *infra*, on "knowingly using an interactive service to display in a manner available to a person under 18 years of age" indecent material). Once the plaintiffs' meritless claim as to the alleged vagueness of the indecency standard is put to rest, *see supra*, there should be no constitutional barrier to prohibiting the transmission of indecency to a specific person known to be a minor.

Gov't Post-Hearing Memorandum of Points and Authorities 45 n.58.

The ACLU appellees contend (Mot. to Aff. 25-27) that Sections 223(a)(1)(B) and 223(d)(1)(A) will not bear the construction we have placed upon them. They argue (*id.* at 26) that those Sections must be construed to reach any communication "that might be seen by any minor" and that they are therefore subject to the same constitutional analysis as Section 223(d)(1)(B). But Section 223(a)(1)(B) expressly provides that a violation occurs only when someone initiates the transmission of an indecent communication, "knowing that the recipient of the communication is under 18 years of age." Under that statutory text, a violation does not occur simply because someone posting indecent information on the Internet is aware that minors who are linked to the Internet can seek and obtain access to the public portions of the Internet. ACLU Mot. to Aff. 26-27. Instead, the person initiating the indecent communication must *know* that a *specific recipient* of *his* message is under 18.

The same is true of Section 223(d)(1)(A), which provides that whoever "knowingly uses an interactive computer service to send to a specific person or persons under 18 years of age" patently offensive communications shall be guilty of an offense. The ACLU appellees err in contending (Mot. to Aff. 26) that the knowledge requirement in Section 223(d)(1)(A) requires only knowledge that a computer is being used, not knowledge that the specific person receiving the message is under 18 years of age. Under well-established principles of statutory construction, the knowledge requirement applies to both elements of the offense. *United States* v. *X-Citement Video, Inc.*, 115 S. Ct. 464, 467-469, 472 (1994).[1]

[1] Contrary to the ALA appellees' understanding (Resp. 24-26), we do not interpret Sections 223(a)(1)(B) and 223(d)(1)(A) as reaching only those situations in which the sender knows that the *only* persons receiving an indecent message are minors. Those Sections also apply when a sender transmits a message to more than one recipient, knowing that at least one of the specific persons receiving the message is a minor.

4. The district court also erred in holding that Section 223(d)(1)(B) is facially unconstitutional. As we show in our jurisdictional statement (at 21-25), the statutory defenses to prosecution set forth in Section 223(e) afford sufficient opportunities for the communication of indecent speech to satisfy the applicable First Amendment standards.[2] Appellees attempt to rely on the district court's "finding" that the defenses are "effectively unavailable for non-commercial, not-for-profit entities." See ALA Resp. 9. That reliance is misplaced for several reasons.

a. First, the district court's "finding," even on its own terms, does not address one extremely important category of users who can take advantage of the statu-

[2] Although the CDA's restrictions on indecency satisfy the strictest First Amendment standard, we do not concede that such a standard controls this case or that it would apply in the same way in this context as in other contexts. For example, in deciding the appropriate level of scrutiny for government regulation of indecency, there are important similarities between television and the Internet: both intrude into the privacy of the home; project visual images that are capable of being stored; are unusually accessible to children; are used by children for substantial periods of time; and are difficult for parents to supervise effectively. See *Denver Area*, 116 S. Ct. at 2386-2387 (opinion of Breyer, J.). While the likelihood of inadvertent exposure to indecent material is not as significant on the Internet as on television, that difference does not necessarily warrant the application of a different legal standard. Indeed, because millions of people disseminate information on the Internet without the intervention of editors, network censors, or market disincentives, the indecency problem on the Internet is much more pronounced than it is on television.

tory defenses—commercial users. As we show in our jurisdictional statement (at 22), the credit card defense is clearly available to those users, and they are responsible for a significant amount of patently offensive, sexually explicit material available on the Internet today.

b. Second, and more fundamentally, the district court's "effectively unavailable" test is misconceived as a legal matter. The court did not limit that concept to situations in which current technology precludes reliance on the defense. The methods of compliance that we have outlined for non-commercial users—adult IDs for non-commercial web sites, and closed systems for chat rooms, mailing lists and newsgroups—are technologically feasible, and the district court did not find otherwise. The district court's conclusion that those methods of compliance are nevertheless effectively unavailable rests on the mistaken premise that a method of compliance is available only if it is essentially burden-free.

For example, the district court apparently rejected the use of adult ID services as an available option for non-commercial web sites in part because the displayers who happen to use existing services to screen access to their material at the present time are commercial pornographers, and appellees (or those who might seek access to their material) would not want to be associated with those displayers. See ALA Resp. 17 (citing J.S. App. 55a). That concern, however, does not make the adult ID option "effectively unavailable." Appellees have at least two "available" options. At no cost, they can use one of the existing services, in which case that service would no longer exclusively serve pornographic sites; or they can pool their considerable resources and establish their own adult ID service or induce another person to provide that service. In a setting like the Internet, that has responded rapidly to technological and market developments, it is in

keeping with First Amendment principles for Congress to rely on such developments to respond to the pressing need to keep indecent material from children. As a matter of law, then, such modest burdens do not render adult ID services effectively unavailable for non-commercial web sites.[3]

For the same reason, the district court erred in concluding that the statutory defenses are effectively unavailable for chat rooms, mailing lists, and newsgroups. Although users would have to incur some burdens in establishing a closed system, and in establishing a screening mechanism to ensure that only adults are admitted into the closed system, see J.S. 23-24, such burdens do not render those methods of communication effectively unavailable.

c. The district court's unavailability determination also rests on the mistaken view that someone who is interested in communicating patently offensive, sexually explicit material over the Internet has an unqualified First Amendment right to do so through every one of the Internet's modes of communication. For example, a person who already has a web site (or could readily establish one) can effectively disseminate indecent information while simultaneously screening out children. Nothing in this Court's First Amendment jurisprudence suggests that such a person must also have an opportunity to communicate that same indecent message through a newsgroup or a mailing list, when he could simply invite

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[3] The other reason given by the district court for rejecting adult ID as a viable option is also inadequate. While the government expert did not have personal knowledge of the existing services, J.S. App. 55a, the material submitted to the district court constituted probative evidence that such services can effectively screen children from web sites, and appellees offered no evidence to the contrary. See J.S. 23.

newsgroup or mailing list readers to visit his web site for the purpose of viewing that message. See J.S. 24-25.

5. Appellees contend that the district court's findings demonstrate that the CDA will not be effective in accomplishing its goal because it will not deter persons outside the country from posting indecent communications. ALA Resp. 20-22. In support of that contention, however, appellees cite only one district court finding—that approximately 40% of the content on the Internet originates outside the United States. *Id.* at 9 (citing J.S. App. 59a). The district court made no finding concerning what percentage of indecent speech originates outside the United States; it made no finding concerning the extent to which the CDA would deter the posting of indecent information outside the United States; and it reached no conclusion concerning the legal significance of any possible diminution of the CDA's effectiveness caused by indecency that originates from outside this country. Appellees rely on Judge Dalzell's statement that the CDA's restrictions "will almost certainly fail to accomplish the Government's interest." *Id.* at 20 (quoting J.S. App. 145a). But that statement was not joined by either of the other judges, and it is not supported by the district court's findings. It therefore provides no basis for affirming the district court's preliminary injunction.

6. Appellees similarly err in contending (ALA Resp. 22-23) that the district court's findings demonstrate that parental control software that attempts to screen out indecent information, such as Cyber Patrol or Surf Watch, is a less restrictive alternative that effectively serves the government's interests. The district court specifically found that such software cannot screen out sexually explicit images on a web site that are unaccompanied by suggestive text unless those who configure the software

are aware of the site. J.S. App. 42a. Even when screening software is used, it is therefore relatively easy to find sexually explicit sites. *Shea* v. *Reno*, 930 F. Supp. 916, 932 (S.D.N.Y. 1996). In addition, parental control software is used by a very small percentage of households with access to the Internet. For example, as of the time of the *Shea* decision, Surf Watch was used by only 450 individual households. *Ibid.* Thus, despite the district court's prediction that parental control software might soon be a reasonably effective method of screening indecent communication, J.S. App. 42a, the district court did not find that it is currently effective in serving the government's compelling interests, and it did not rely on the availability of parental control software as a basis for its ruling that the CDA's prohibitions are facially unconstitutional.

Appellees offer two additional alternatives that are even less effective in serving the government's compelling interests. Appellees propose (ALA Resp. 23) that parents use a screening mechanism that screens out *all* Internet speech that has not been affirmatively identified as appropriate for children by a particular rating service. Because only a very small fraction of Internet sites have been rated by any service, however, that option would force parents to dramatically limit the amount of information to which their children would have access. Appellees' other alternative is still more draconian—parents could "deny their children the opportunity to participate in the medium." *Ibid.* Far from being less restrictive, the two additional alternatives proposed by appellees would seriously undermine the government's ability to meet its substantial interest in furthering the First Amendment interests of all parents and children in using what has become an unparalleled tool for communicating and retrieving information.

7. Finally, as we argue in our jurisdictional statement (at 25-26), even if one or more of the CDA's restrictions were unconstitutional as applied to some defined class of cases, the district court nonetheless erred in facially invalidating all three restrictions. Contrary to appellees' understanding (ALA Resp. 16; ACLU Mot. to Aff. 24-25), we do not argue that the district court should have construed the CDA's restrictions to reach only certain forms of communication; nor do we argue that the district court should have rewritten those statutory prohibitions. Instead, consistent with the statutory command in the applicable severability clause, 47 U.S.C. 608, we argue that the district court was required to limit injunctive relief to those applications of the statutory restrictions that it found unconstitutional. Under the severability clause, a determination that one of the CDA's provisions is unconstitutional as applied to particular persons or circumstances "shall not * * * affect[]" "the remainder of the chapter and the application of such provision to other persons or circumstances." 47 U.S.C. 608. Appellees offer no defense of the district court's failure to observe that requirement.

* * * * *

For the foregoing reasons, as well as those stated in our jurisdictional statement, the Court should note probable jurisdiction.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

NOVEMBER 1996

FILED
JAN 29 1997
CLERK

No. 96-511

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-511

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., APPELLANTS

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOINT APPENDIX

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 96-CV-963

AMERICAN CIVIL LIBERTIES UNION, ET AL., PLAINTIFFS

v.

JANET RENO, IN HER OFFICIAL CAPACITY AS
ATTORNEY GENERAL OF THE UNITED STATES,
DEFENDANT

RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
2/8/96	1	COMPLAINT. Filing fee $120. Receipt #581198 (td)
2/12/96	7	TRANSCRIPT of Temporary Restraining Order Hearing on 2/8/96. (jo)
2/15/96	12	ORDER that pursuant to the provisions of 28 U.S.C. Section 2284. I designate the Honorable Dolores K. Sloviter, United States Circuit Judge, and the Honorable Stewart Dalzell, United States District Judge for the Eastern District of Pennsylvania, to sit with the Honorable Ronald L. Buckwalter, United States District

Judge for the Eastern District of Pennsylvania, as members of the court for the hearing and determination of the above captioned matter. (Signed by Honorable Dolores K. Sloviter, Chief Judge Third Judicial Circuit) 2/15/96 entered and copies mailed. (jo) [Edit date 02/15/96]

2/15/96 14 ORDER that plaintiffs' motion for a temporary restraining order is granted in part as follows: the defendant, her agents and her servants are hereby enjoined from enforcing against plaintiffs the provisions of 47 U.S.C. Section 223(a)(1)(b)(ii), insofar as they extend to "indecent" but not "obscene". The plaintiffs' motion is in all other respects, denied. Unless previously ordered by this court, pursuant to 28 U.S.C. Section 2284(b)(3) this order shall remain in force only until the hearing and determination by the district court of three judges of the application for a preliminary injunction. (Signed by Judge Ronald L. Buckwalter) 2/16/96 entered and copies mailed. (jo) [Entry date 02/16/96]

2/16/96 15 MOTION by plaintiffs for preliminary injunction, certificate of service. (ag) [Entry date 02/20/96]

2/27/96 21 ORDER, that pursuant to FED.R. CIV.P. 42(A), these actions (96-963 and

96-1458) shall be consolidated for all matters relating to the disposition of motions for preliminary injunction in these cases, including the hearing on such motions. (Signed by Judge Stewart Dalzell), 2/28/96 entered and copies mailed. (ag) [Entry date 02/28/96] [Edit date 02/28/96]

3/12/96 30 EXHIBITS by MOVANT AMERICAN LIBRARY ASSOCIATION, INC. Plaintifffs' to motion for a preliminary injunction. (2 volumes), certificate of service. (ag) [Entry date 03/13/96]

3/20/96 49 The parties stipulations in preparation for the preliminary injunction hearing. (ag)

3/22/96 56 Minute entry dated 3/21/96 re: civil trial (day one). All parties present. Plantiffs witnesses called and sworn. (ag) [Entry date 03/25/96]

3/22/96 57 Minute entry dated 3/22/96 re: Civil trial (day two); All parties present. Plaintiffs witnesses called and sworn. (ag) [Entry date 03/25/96]

4/2/96 72 Minute entry dated 4/1/96 re: civil trial day three continues. (ag)

4/15/96 83 Minute entry dated 4/15/96 re: Civil non-jury trial. Government's witness:

Dr. Dan Olson, prev. sworn. The govt. proffers the exhibits it seeks to move into evidence, etc. (ag) [Entry date 04/16/96]

4/23/96 90 ANSWER to Complaint by DEFENDANT JANET RENO (Attorney CRAIG M. BLACKWELL), certificate of service. (td) [Entry date 04/24/96]

6/12/96 125 ADJUDICATION AND ORDER that plffs' motions for preliminary injunction are granted; deft. Attorney General Janet Reno, and all acting under her direction and control, are preliminarily enjoined from enforcing, prosecuting, investigating or reviewing any matter premised upon: (a) Sections 223 (a)(1)(b) and 223 (a)(2) of the Communications Decency Act of 1996 ("the CDA"), Pub. L. No. 104-104, 502, 110 Stat. 133, 133-36, To the extent such enforcement, prosecution, investigation, or review are based upon allegations other than obscenity or child pornography; and pursuant to FED. R. CIV.P. 65(c), plffs need not post a bond for this injunction, etc.; And the parties shall advise the court, in writing, as to their views regarding the need for further proceedings on the later of (a) thirty-one days from the date of this order, or (b) ten days after final appellate review of this order. (Signed by Chief Judge Dolores K.

Sloviter, Judge Ronald L. Buckwalter and Judge Stewart Dalzell) 6/12/96 entered and copies mailed. (mc) [Edit date 06/12/96]

6/26/96 126 UNOPPOSED MOTION by defendant janet reno for clarification of preliminary injunction pursuant to Rule 60, memorandum, certificate of counsel, certificate of service. (jo) [Entry date 06/27/96]

6/28/96 127 ORDER that defts unopposed motion for clarification and amendment of preliminary injunction pursuant to Rule 60 is GRANTED and it is further ORDERED that paragraph 2(a) of this court's order dated 6/11/96 is hereby clarified as follows: defts are enjoined from enforcing, prosecuting, investigating or reviewing matters premised upon 47 U.S.C. Section 223(a)(2) only with respect to the prohibited activities specified in Section 223(a)(1)(b) as they relate to "indecent" communications. Defts are not enjoined from enforcing, prosecuting, investigating or reviewing allegations of violations of Section 223(a)(2): based on prohibited activities specified in Section 223(a)(1)(A), (C), (D) OR (E); or based on prohibited obscenity or child pornography activities as specified in Section 223(a)(1)(B). The court's preliminary injunction order entered 6/12/96 is

unchanged in all other respects. This clarification order shall not extend the date of the entry of the preliminary injunction order for purposes of the preliminary injunction order pursuant to Section 561(b) of the Telecommunications Action of 1996, Pub. L. No. 104-104, Section 561 (b), 110 Stat. 143 (signed by Judge Ronald L. Buckwalter, Dolores K. Sloviter, Stewart Dalzell) 6/28/96 Entered and copies faxed and mailed. (td) [Edit date 06/28/96]

7/1/96 128 NOTICE OF APPEAL to U.S. Supreme Court by DEFENDANT JANET RENO. Copies to: Judge Ronald L. Buckwalter, Clerk USCA, Appeals Clerk, and Bruce J. Ennis Jr., Bruce A. Taylor, Cathleen A. Cleaver, James Henderson Sr., Colby M. May, Jay Alan Sekulow, L. Theodore Hoppe Jr., James D. Crawford, Andre L. Dennis, Ronald P. Schiller, Stewart Dalzell, Marjorie Heins, Ann Elizabeth Beeson, Michael Godwin, Marc Rotenberg, David L. Sobel, Dolores K. Sloviter, Mary E. Kostel, Patricia M. Russotto, Theodore C. Hirt, Jason R. Baron, Anthony J. Coppolino, R. Kmetz, Laura Abel, Christopher A. Hansen, Stefan Certificate of Service. (jo) [Edit date 07/02/96]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 96-CV-1458

AMERICAN LIBRARY ASSOCIATION, INC., ET AL.,
PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
DEFENDANTS

RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
2/26/96	1	COMPLAINT for declaratory and injunctive relief. Filing fee $120. Receipt #582610. (td) [Edit date 02/26/96]
2/27/96	4	ORDER, that pursuant to FED.R. CIV.P. 42(a), these actions (96-963 and 96-1458) shall be consolidated for all matters relating to the disposition of motions for preliminary injunction in these cases, including the hearing on such motions. (Signed by Judge Dalzell), 2/28/96 Entered and copies mailed. (ag) [Entry date 02/28/96] [Edit date 02/29/96]

VIII

4/23/96 22 ANSWER by U.S. DEPT OF JUSTICE, JANET RENO, HEALTH SCIENCES LIBR, INTERACTIVE DIGITAL, MAGAZINE PUBLISHERS, THE MICROSOFT NETWOR, NATIONAL PRESS PHOTO to first amended complaint, Certificate of Service. (gn) [Entry date 04/24/96]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

CIV. A. NO. 96-0963

AMERICAN CIVIL LIBERTIES UNION, ET AL., PLAINTIFFS

v.

JANET RENO, IN HER OFFICIAL CAPACITY AS
ATTORNEY GENERAL OF THE UNITED STATES,
DEFENDANT

CIV. A. NO. 96-1458

AMERICAN LIBRARY ASSOCIATION, INC., ET AL.,
PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
DEFENDANTS

DECLARATION OF HOWARD A. SCHMIDT

I, Howard A. Schmidt, hereby state and declare and present the following sworn direct testimony in this action as follows:

1. I am currently a Supervisory Special Agent, Director of the Air Force Office of Special Investigations ("OSI"), Computer Crime Investigations. I have served at OSI since September 1994 and have been

Director of Computer Crime Investigations since January 1995. In this capacity, I manage the Air Force OSI Investigative Operations Center, Computer Crime Division, at Bolling Air Force Base in Washington, D.C. The Office of Special Investigations undertakes investigations related to criminal and counter-intelligence matters for the United States Air Force and Department of Defense. OSI also assists a range of Federal, State, and local law enforcement agencies, such as the Department of Justice, the Federal Bureau of Investigation, the U.S. Customs Service, the U.S. Postal Service, the U.S. Secret Service, and other military investigative agencies, in connection with various types of criminal/counter intelligence investigations. The Computer Crime Investigation Division is specifically concerned with computer intrusion investigations and computer forensics. The latter mission concerns obtaining evidence contained on or available through computer systems. I have previously testified as an expert witness in a military criminal proceeding on the collection and preservation of computer evidence. I am a regular instructor for the National White Collar Crime Center in West Virginia, the FBI Academy in Quantico, Virginia, the Air Force OSI Academy at Andrews Air Force Base, Maryland, as well as for various other Federal, state, and local, and international law enforcement agencies. I teach courses on the collection and preservation of computer evidence, and conducting investigations in a computer environment. A fuller biographical statement is attached at Exhibit 1.

2. I am an expert in computer investigatory matters, including computer forensic procedures—the process for determining whether a computer has been

used as an instrumentality to commit a crime (for example "hacking" into another computer), or used to store information that may be evidence in a criminal investigation. My expertise also includes an understanding of computer operating systems, such as DOS, Macintosh, OS2, and Microsoft Windows, as needed to carry out my investigative duties.

3. My investigatory experience specifically includes multiple investigations that concerned the online transmission of sexually explicit materials through computers, including distribution and possession of child pornography as well as the range of other types of sexually explicit material. Throughout my career both at OSI and in prior local and Federal law enforcement positions, I have been involved in approximately 30 to 50 such investigations, either as an actual investigator, or a supervisor to other investigators, or as a consultant to another Federal, state, or local law enforcement agency whose agents were conducting the actual investigation. I estimate that in at least 70% of these cases I was personally involved in investigating where sexually explicit materials can be located through online computer searches, including on Internet Web sites, newsgroups, and Bulletin Board Systems (BBS).

4. In general, my investigative actions fall into two major categories: I have searched Internet sites or BBS sites to determine the location of a particular graphical image that had been provided to me for investigation. Alternatively, I have often been asked to search among Internet sites to locate specific sites and determine what types of material was on them. In the course of such investigations, I have viewed a range of a wide range of sexually explicit materials, including nude or partially nude sexually explicit

images, such as "centerfold-type" images, images of simulated sexual acts, images of actual sexual acts, "hardcore" sexual images, and child pornography.

5. I believe I am qualified to offer fact and opinion testimony in this case on several topics discussed below, including:

(i) the range of sexually explicit materials that are available through computer online access, including some of the places this material is available online, such as Bulletin Board Services and Internet Web sites and newsgroups, the methods by which such sites can be accessed, and the computer-based "links" that connect sexually explicit sites;

(ii) the ease by which sexually explicit sites can be located and accessed by undertaking "key word" searches through "search engines" for finding information on the Internet;

(iii) the widespread availability of sexually explicit materials online, based on my experience as a law enforcement officer;

(iv) the existence of mechanisms that are being offered by certain Web sites to restrict access by minors;

(v) the practical ability of parents to deal with the easy availability of sexually explicit material on their own.

SEXUALLY EXPLICIT MATERIALS ONLINE

6. The first part of my testimony describes some of the searches I recently undertook in connection with presenting this testimony. It sets forth examples of sexually explicit materials available on three main sources on the Internet: World Wide Web Sites, Bulletin Board Services, and Usenet Newsgroups. Examples of the types of materials I found are attached as

exhibits to this declaration. The process by which I searched and found these materials on the Internet is described below. In undertaking these searches, I first "logged-on" to the Internet through MCI, one of many companies that provides access to the Internet. I conducted most of the searches described herein using NetScape 2.0, a browser program that allows the user to conduct searches for materials on the Internet. In addition, the computer I used contained a modem with a 28.8 baud rate, which for the past year has come installed on many new computers as the current "state-of-the-art." I also utilized a computer monitor that shows images in color—which has also been used for many years a feature on home computers.

A. World Wide WEB Sites

I. *YAHOO! "XXX" Search—Links Off First 25 Hits*

7. The first search I undertook was one that was specifically intended to find sexually explicit sites on the World Wide Web. Using the YAHOO! search engine—one of several methods by which users of the Internet can search for materials—I conducted a search using the key words "XXX." The first 25 hits were links to Web sites offering a variety of adult or "XXX" rated films, videos, stories, images, interactive CD-ROMs, "adult toys," and magazines. Included among these were "*Las Vegas Showgirls*," "*funplace*," and "*Sextacy*," each of which contained links to sexually explicit images. *See* Exhibit 2.

8. ***Las Vegas Showgirls***: The link to *Las Vegas Showgirls* offered "Free nude pictures, hot live phone sex and XXX live video conferencing with Las Vegas Showgirls." Exhibit 2, page 2. I "clicked" on this

link—that is, I used my computer "mouse" to point an arrow over this link and clicked once on the mouse.

a. This brought up a "warning" page notifying the user that the site "contains material intended for Adult viewing only." *See* Exhibit 3, page 1. The page includes a link called *Yes, I am over 18 years old and would like to access the Sex Vision/Las Vegas Showgirls Home Page.* I clicked on this link. Once I did so, I immediately moved on to the next step in the search process. There was no other hindrance to proceeding other than to click after the "warning" screen.

b. Clicking past the warning screen brought up the "home page" of Sex Vision—that is, the first page of this Web site which summarized its over contents. Several images of nude or partially nude women appear on this page. *See* Exhibit 3, page 2. Thus, just two steps removed from the "XXX" search on YAHOO, I was viewing sexually explicit images of nude women. Several links appear at the bottom of the home page. One link called *Sample Screen Shot* appears in a box near the bottom of the Home Page. Exhibit 6, page 3. I clicked on this link.

c. This immediately brought up "Sex Vision Sample Screenshot" page that contained some of the same sexually explicit images that appear on the home page. Also among the sample images is a computer screen showing an image of a partially nude woman. *See* Exhibit 3, page 4. At the bottom of the page there is a *Back to Main Page* link. I clicked on this link, which returned me to the Sex Vision Home Page. Exhibit 3, page 2.

d. I then clicked on another link that appears at the end of the Sex Vision Home Page called "*Information.*" This brought up a screen that also contained some of the same sexually explicit images that appear on the Home Page, as well as another sample computer screen showing an image of a partially nude woman. *See* Exhibit 3, page 5. The page also includes text describing the services available at Sex Vision, the computer requirements for utilizing these services, and the prices charged for the available services. Web sites such as this that make sexually explicit materials available commonly provide "free samples" and then provide information on how a user to purchase more materials. In this case, the Information Page notes that Visa, MasterCard and American Express can be used to pay for services ordered from Sex Vision.

e. No additional images were available for free at this site. Using my computer with a 28.8 bps modem, it took only a matter of seconds from the time my search identified this site to click through the links as described above.

9. ***The FunPalace***: I then returned to my initial YAHOO! search result displaying the first 25 hits on the search "XXX" (Exhibit 2) (which involved simply clicking on a "BACK" feature on the Web Browser software which essentially "turns the pages" back to my original search result. The link to *funpalace* offered "instant access to 100's of hardcore pics & movie clips." *See* Exhibit 2, page 2. I clicked on this link.

a. This brought up "*The FunPalace*" home page. *See* Exhibit 4, page 1. This page also contains a warning screen and links to other locations at the Web site, including a link to *Samples.* I clicked on this link.

b. This brought up a short page of text stating: "Here's a little taste of hard-core porn photos, the

pictures inside are completely uncensored.Raw, [sic] XXX skin on skin! When you come back as a V.I.P. member, I let you go ALL the way in [sic] I'll be waiting for you!!!" *See* Exhibit 4, page 3. Again, this site provides free samples, with instructions on how to buy more. There is link to *Samples* on this page. I clicked on this link.

c. This brought up a page called "Index of/index.samples," which listed 19 links to images. *See* Exhibit 4, page 4. I clicked on the link to *samp1.jpg*.

d. This brought up a page with two sexually explicit images of a couple engaging in sexual intercourse. *See* Exhibit 4, page 5. It took me only three clicks of the mouse and a few seconds after entering The FunPalace to reach these images.

e. I returned to the "Index of/index.samples" (Exhibit 4, page 4) and clicked on the link to *samp6.jpg*. This brought up a sexually explicit image of a woman. *See* Exhibit 4, page 6.

10. ***Sextacy***: I then returned to my initial YAHOO search result displaying the first 25 hits on the search "XXX." Exhibit 2. The link to *Sextacy* is described as a "virtual sex site, browse through hundreds of pictures with your first virtual account: amateurs and celebrities, XXX." *See* Exhibit 2, page 2. I clicked on this link. This brought up the "Sextacy Warning Page." *See* Exhibit 5, page 1. At the end of "Sextacy Warning Page," appears a link to *Other Adult Links*. *See* Exhibit 5, page 2. I clicked on this link. This brought up a list of links to other sites, including one to *XXX City* and one to *Download 30+ Nude Celebrities Free*. *See* Exhibit 5, page 3.

11. *Adult Verification*: The *Sextacy* site is a good example of a site that required credit card or other

verification to gain access, and provided several links to information and services on how to do so. I could not proceed further on this site without an Adult Check ID or a First Virtual Account. The "Sextacy Warning Page" provides a direct link to *Adult Check ID*, Exhibit 5, page 1, and *First Virtual Account*, Exhibit 5, page 2. I clicked on the link to *Adult Check ID*.

a. This brought me to the "*Adult Check*" home page. Exhibit 6, page 1. The home page states:

> sites using Adult Check are able to restrict minors from entering. It is very easy to use for Net users, simply fill out the form, including your Credit Card information, we charge a nominal $9.95 annual fee, and we will give you an Adult Check ID which you can use at all participating sites. This means that anytime you want to enter a site utilizing Adult Check, you simply enter your Adult Check ID # and it will let you enter, for FREE!

The "*Adult Check*" home page includes a link to *Information*. I clicked on this link.

b. This brought up a page called "More Information." Exhibit 6, page 2. This page provides additional information about the *Adult Check ID* and advises the user that "[w]e are currently expanding the number of Adult Sites using our system, it is growing very rapidly, so get [an *Adult Check ID*] now to be able to see the sights YOU want to see!" At the bottom of the page appears a link called *Links*. I clicked on this link.

c. This brought up a list of linked "Sites Utilizing Adult Check," including *Lust Lane*, *Here Beautiful hot girls!!!*, *Don's World*, *XXX City*, *X-Sites* and

World Wide Sex Links. *See* Exhibit 6, page 3. At the end of the "Sites Utilizing Adult Check" appears the statement "If you own an Adult Site and would like information on Participation click *here*." I clicked on the link (the word *here*).

d. This brought up a page called "Adult Site Owners." *See* Exhibit 6, page 5. This page advises adult site owners how to install and use the Adult Check System. The operators of Adult Check pay adult site operators for each referral to Adult Check from the site. The page includes a site application form at the end. The page also includes a link to the user *application form*. *Id.* at page 2. I clicked on the link to the *application form*. This brought up an Adult Check Application Form for users. *See* Exhibit 6, page 7.

e. I then returned to the list of "Sites Utilizing Adult Check." *See* Exhibit 6, page 3. To check another link, I clicked on *Here Beautiful hot girls!!!* This brought up a page advising that nude pictures appear on the page and providing links to *Adult Check* and *Adult Verification System*. Exhibit 7.

f. I then returned to the list of "Sites Utilizing Adult Check." Exhibit 6, page 3. I clicked on the link to *Don's World*. This brought up the "Don's World" home page. *See* Exhibit 8, page 1. The site offers "Adult Nudes and Hard core Pics - Lots Now & Many More on the Way." The "Don's World" home page also offers links to three adult verification services: "*Validate*," "*Adult Check*," and "*Adult Verification System*." Exhibit 8, page 2. I clicked on the link for *Validate*.

g. This brought up a page called "Validate" which provides information about the services provided by "*Validate*." At the bottom of the page is a link to

Register Your Adult Site Free. Exhibit 8, page 4. I clicked on this link.

h. This link brought up the "Validate" home page, Exhibit 8, page 5, which provides information to adult site owners on registering with "Validate." The page includes the following statement:

> When you register your website for this service you will be given a 'frontpage' that asks for a user ID and password. When this information is entered and submitted by the user, it accesses our database for verification. Once verified, the user will be automatically 'transported' to the webpage that you specify! If the user is not 18 years of age or older or has not been verified by our service they will not be able to access your site! There is no need for you to have access to cgi scripts since everything is taken care of for you!

At the bottom of the page are several links to additional information about "Validate," including one for *Validate Services*. I clicked on this link. This brought up a screen advising users how to sign up for "Validate." Exhibit 8, page 6.

i. Finally, a description of a "First Virtual Account Application" is set forth at Exhibit 9. First Virtual appears to be an entity which provides Internet users with a 12-digit "Personal Identification Number" after credit card information is provided to First Virtual. Based on the information provided, the First Virtual PIN number can then be used to access certain sites on the Internet and purchase materials from such sites, including sexually explicit sites. *See* Exhibit 5, page 2 (Sextacy Web site).

II. *YAHOO! "XXX" Search—Links Off Hits 26-50*

12. I returned to my initial search results for the YAHOO! search for matches containing the search term "XXX." Exhibit 10. After the first 25 hits appears a link to *Next 25 matches*. *See* Exhibit 2, p. 2. I clicked on this link.

13. This brought up a screen displaying matches 26-50 of the YAHOO! search for matches containing the term "XXX." Hits 26-50 also are links to Web sites including *Honey, The*, *Absolute Sex*, *The Ferrari Club*, *Amateur Hardcore*, and *Cybergirls Webzine* each of which were links to sexually explicit images.

14. ***Honey, The***: The link to *Honey, The* offered "[i]nstant access to Hot XXX Adult Pictures." *See* Exhibit 10, page 2. I clicked on this link. This brought up The Honey Page Web site. Exhibit 11. On the first page is an image of a woman clothed only in panties. A passcode is needed to proceed any further on this site.

15. ***Absolute Sex***: I returned to the display of matches 26-50 from the YAHOO! search for matches containing the term "XXX." The link for *Absolute Sex* advertised "thousands of new XXX adult images . . ." *See* Exhibit 10, page 1. I clicked on this link.

a. This brought up the home page for the Absolute Sex Web site, which contains an image of a nude woman. *See* Exhibit 12, page 1. The page also "warns" that "You Must Be 18 To Enter This Site." The page then contains a link called Enter *Absolute Sex*. I clicked on this link.

b. This brought up a page containing information on how to access the "thousands of high-quality XXX rated GIF/JPEG images and Animations" available at

the site. *See* Exhibit 12, page 2. Also included on this page is a link to *Sample Page*. I clicked on this link.

c. This brought up the "Absolute Sex Preview" page displaying 6 sexually explicit images of nude or partially nude men and/or women with the breast and genital areas on each of the images covered with a small purple patches. *See* Exhibit 12, page 3. Each of the images is linked to a full-sized picture. The first image is captioned "Click on this HOT Burnette's thumbnail picture to view the full size image." I clicked on this image.

d. This brought up a full-sized image of the picture. Exhibit 12, page 5. The image is a frontal picture of a nude woman with her breasts partially covered by a purple dot

e. I returned to the "Absolute Sex Preview" page. Exhibit 12, page 3. The second image is captioned: "Check out this SEXY Amateur Model." I clicked on this image. This brought up a full-sized picture of a nude woman with her breasts and genitals partially covered by a purple dot. *See* Exhibit 12, page 6.

f. I returned to the "Absolute Sex Preview" page. The third image is captioned: "Say hello to Jon." I clicked on this image. This brought up a full-sized picture of a nude man with his genitals partially covered by a blue rectangle. Exhibit 12, page 7.

g. It took me only a few clicks of the mouse to reach each sexually explicit materials on this Web site from the search results.

16. ***Ferrari Club***: I then returned to the display of matches 26-50 from the YAHOO! search for matches containing the term XXX. The link to *Ferrari Club* offers "online erotica (pictures, movies), Immediate access, 100% Confidential, 50,000 files, sex, xxx, porn,

adult bbs." *See* Exhibit 10, page 2. I clicked on this link.

a. This brought up several pages containing information "warning" potential viewers that "sexually explicit material" could be accessed at the site. *See* Exhibit 13, pages 1-4. At three points on these warning pages, I had to click on a *proceed* link three times to reach the MainPage of Ferrari Club.

c. The MainPage introduces "Alexandria," as the "hostess" at the *Ferrari Club*. The MainPage contains links to several sites in the *Ferrari Club*, including "Take a peek inside." An arrow next to the "Take a peek inside" link points to a sexually explicit picture of a man and woman lying on a bed, with their genitalia covered with a small black circle. Exhibit 13, page 5.

d. I then clicked on the *Take a peek inside* link. This brought up a screen listing categories of sexually explicit images that are available to "V.I.P. Cardholders." *See* Exhibit 13, page 6. At the bottom of the page the statement appears: "Only V.I.P. cardholders are granted FULL access to the lounge, but you're a cutie, so I'll let you sneak a peek just this once." This statement is followed by a link called *SNEAK*. Exhibit 13, Page 6.

e. I then clicked on *SNEAK*. This brought up a screen with a picture of a man and a woman lying on a bed with their genitalia covered with a small black circle. Exhibit 13, page 7. Under the picture is a link to *Next Picture* . . .

f. I then clicked on *Next Picture* . . . This brought up a screen with an explicit image of a man and woman engaging in intercourse, with the couple's genitalia covered with small black circles. Exhibit 13, page 8.

e. It took only a matter of seconds to proceed through these links to the images described above.

17. ***Amateur Hardcore:*** I then returned to the display of matches 26-50 of matches containing the term "XXX." The link to *Amateur Hardcore* offers a "searchable database of XXX hardcore images." Exhibit 10, page 1. I clicked on this link.

a. This brought up a screen entitled "WELCOME to Amateur Hardcore." Exhibit 14, page 1. This site offers a "searchable database of XXX hardcore images." The site also provides a search engine that will search by keyword for specific types of sexual activities.

b. The "WELCOME to Amateur Hardcore" page also contains a link to the *daily hot shot*. I clicked on this link. This brought up a screen entitled "Pic of the Day! (R-rated Version)" which includes an image of a woman's buttocks and exposed genitals. Exhibit 14, page 3.

18. ***Cybergirls Webzine***: I then returned to the display of matches 26-50 of matches containing the term "XXX." The link to *Cybergirls Webzine* states: "made by real cybergirls. Rated XXX for adults over 18 only! MasterCard and Visa accepted." Exhibit 10, pages 1-2. I clicked on this link.

a. This brought up the home page for "Cybergirls Webzine." Exhibit 15, page 1. The home page notes that it is "For ADULTS over 18 only!" It then offers users a choice of two links: *I am already a PAID MEMBER* and *I want to see a sample first*. I clicked on the *sample* link.

b. This brought up a page introducing a "customer service representative" and providing another link called *CLICK HERE to proceed to CYBERGIRLS WEBAZINE*. Exhibit 15, page 2. I clicked on this

link to proceed. This brought up another page with information on registering to access the site. The page offered a link called *I want to see a sample first.* Exhibit 15, page 3. I clicked on this link.

c. This brought up a page advertising the Cybergirls bulletin board service. Exhibit 15, page 4. The page also offered a link to the *CONTENTS page.* I clicked on this link. This brought up a Non-members Contents page offering *a FREE sample of our Nasty XXX Photos.* I clicked on this link. Exhibit 15, page 5.

d. This brought up a page of 13 images of nude or partially nude women. Exhibit 15, pages 7-8. At the bottom of the page is a link to *MORE XXX PHOTOS.* I clicked on this link.

e. This brought up a page of three additional images of women posed with their breasts and/or genitals exposed. Exhibit 15, page 9.

f. Each of the images on this site was captioned with sexually explicit language describing the images and activities depicted.

III. ***Lycos Search for "XXX Sex"***

19. In a separate search, I used the Lycos search engine, to search for the terms "XXX Sex." This search result yielded many hits to sites containing sexually explicit material. Exhibit 16. I clicked on the link to *sex-sex-sex-xxx-sex-The Forbidden Zone-xxx-sex-sex-sex-sex-sex.* Exhibit 16, page 4. This brought up the home page of "The Forbidden Zone." Exhibit 17. I could not proceed further on this site without becoming a member. However, the home page of "The Forbidden Zone" includes links to other sites containing sexually explicit material. Exhibit 17, page 2. I clicked on the link to *Steamy Erotic Links.*

This brings up a page advising the user that "Steamy Erotic Links" has moved and gives a link to the new location, *http://webbworld.com/steamy/steamy.htm.* Exhibit 18, page 1. I clicked on this link. This brought me to a list of "Steamy Erotic Links," a series of links to sites containing sexually explicit materials. Exhibit 18, pages 2-10. I clicked on the link to *Hot Sex.* Exhibit 18, page 3.

20. ***Hot Sex*** link brought me to the "Hot Sex" home page, which provides materials for members, but also includes a link to *Free Samples.* Exhibit 19, page 1. I clicked on the *Free Samples* link. This brought up the "Hot Sex Sample Picture Gallery," which offered links to 22 sexually explicit images. Exhibit 19, page 2.

a. In the "Hot Sex Sample Picture Gallery," I clicked on the link to *Beaver Shots.* This brought up an image of a nude woman with her genitals exposed. Exhibit 19, page 4.

b. I returned to the "Hot Sex Sample Picture Gallery" and clicked on the link to *Panties.* This brought up an image of a woman clothed only in panties. Exhibit 19, page 5.

c. I returned to the "Hot Sex Sample Picture Gallery" and clicked on the link to *Boobs.* This brought up an image of a nude woman. Exhibit 19, page 6.

d. I returned to the "Hot Sex Sample Picture Gallery" and clicked on the link to *Cunnilingus.* This brought up an image of an act of oral sex. Exhibit 19, page 7.

21. ***Nikkita's Outrageous Fantasies.*** I then clicked back to the list of "Steamy Erotic Links" and clicked on the link to *Nikkita's Outrageous Fantasies.* Exhibit 18, page 3. The link to *Nikkita's Outra-*

geous Fantasies brought up a page advising the user that the site had moved. The statement "*Click here* to go directly to the Surfing Monkey" appears near the top of the page. Exhibit 20, page 1. I clicked on this link.

a. This brought me to a registration page for the Surfing Monkey home page, including a graphic of *The Surfing Monkey*. Exhibit 20, page 2. Clicking on this graphic linked me to the home page for "The Surfing Monkey." Exhibit 20, page 4. This page included links to several other sites, including *Nikkita's Outrageous Fantasies*. I clicked on this link.

b. This brought up a page of text about the Communications Decency Act. Exhibit 20, pages 6-9. A link at the end of this text tells the user: "You may enter Nikkita's Outrageous Fantasies by *Pressing here*." I clicked on this link. Exhibit 20, page 9.

c. This brought up the home page of "Nikkita's Outrageous Fantasies," which includes a sexually explicit image. Exhibit 20, pages 10-12. The home page also includes a link to *My Photo Album*. Exhibit 20, page 12.

d. This link brought me to "Nikkita's Outrageous Fantasies Photo Album," which provides links to sexually explicit images at this site. I clicked on the link to *Nudes*. Exhibit 20, page 13. This brought up a page entitled "Nudes," which displayed 27 images of a nude or partially nude woman. The images could be displayed in full size by clicking on the picture. Exhibit 20, pages 15-16. I clicked on *Nikki16.jpg*, which brought up a full sized image of a nude woman. Exhibit 20, page 18. I also clicked on *Nikki17.jpg*, which brought up a full-sized image of a nude woman. Exhibit 20, page 19.

22. ***Sexxxnet***: I then clicked back to the list of "Steamy Erotic Links" and clicked on the link to *Hardcore Pictures Archive*. Exhibit 18, page 2. This brought up a page called "Sexxxnet First Amendment Privacy Shield," which explains that the site provides access to material that is "adult oriented." Exhibit 21, page 1. I clicked on the link *I accept the above terms and conditions and wish to continue.*

a. This brought up a page titled "Welcome to Sexxxnet," which provides links to "the hottest and sexiest adult material on the Internet." Exhibit 21, page 2. I clicked on the link to *Hardcore 12 Pack*. This brought up a page titled "Hardcore 12 Pack," which advises users that "[t]o purchase the 12 pack, you must have a First Virtual account, Visa or MasterCard." Exhibit 21, page 3.

b. I then clicked back to the page titled "Welcome to Sexxxnet" and clicked on the link to *Hardcore Pictures Archive*. Exhibit 21, page 2. This brought up a page titled "Hardcore Pictures Archive, which offered for sale "thirty of the hottest and sexiest pictures of hardcore sex known to man." Exhibit 21, page 5. I could not access any of these images without a First Virtual account or a credit card.

23. ***69 Porn Place***: I then clicked back to the initial search result for the terms "XXX Sex" on the Lycos search engine. *See* Exhibit 16. I clicked on the link to *69 Porn Place*. Exhibit 16, page 1. This brought me to "69 Porn Place," which included a link to *45,000 hardcore XXX adult pictures to DOWNLOAD NOW!* Exhibit 22. I clicked on this link.

a. This brought up the main page of "69 Porn Place," which displays an image of a nude woman. Exhibit 22, page 3. I clicked on a link to *Table of Contents*. This brought up the "Table of Contents"

for "69 Porn Place," which includes an image of a nude woman kneeling with her breasts covered by a circle stating "NO minors." Exhibit 22, page 5.

b. I clicked back to main page of "69 Porn Place" and clicked on the *Proceed* link. *See* Exhibit 22, page 4. This brought up a page titled "69 Porn Place" that included a sexually explicit image of a woman. Exhibit 22, page 6. There is a link on the page to *Sample Pictures*. I clicked on this link.

c. This brought up a page of "Free Sample Pictures." Exhibit 22, page 8. I clicked on the link to *sample#01*. This brought up an image of a woman performing oral sex on a man with the genital area covered with a circle stating: "NO minors." Exhibit 22, page 9. I had previously accessed this site on or about February 8, 1996, and the image was not covered in any manner. *See* Exhibit 22, page 10.

d. I clicked back to the page of "Free Sample Pictures" and clicked on *sample#08*. Exhibit 22, page 8. This brought up an image of a nude woman performing oral sex on another nude woman. Exhibit 22, page 11. Again, portions of the picture were covered with a circle stating: "NO minors." I had previously accessed this site on or about February 8, 1996, and the image was not covered in any manner. *See* Exhibit 22, page 12.

e. I clicked back to the page of "Free Sample Pictures" and clicked on *sample#13*. Exhibit 22, page 8. This brought up an image of a partially nude woman with her genital area has been covered with a circle stating: "NO minors." Exhibit 22, page 13. I had previously accessed this site on or about February 8, 1996, and the image was not covered in any manner. *See* Exhibit 22, page 14.

IV. ***Other Web Searches***

24. Tab IV includes other sites I have accessed in conducting searches for sexually explicit material on the Internet in connection with this case.

25. *CyberBabes*: Exhibit 23, the search result of a search for "CyberBabes," provides links to sites containing sexually explicit images. I had previously accessed this site through a search for sexually explicit materials conduced on or about March 5-6, 1996. I accessed this site again on April 4, 1996.

a. The "CyberBabes" home page contains links to a number of sexually explicit sites. A box describing links to these sites appears on the home page. *See* Exhibit 24, pages 2-3. The last box in the fourth row of boxes has a link to *Beautiful Women*. Exhibit 24, page 3. I clicked on this link.

b. This brought up a warning page and a link to proceed further into the site. Exhibit 24, page 6. I clicked on the link.

c. This brought up an image of a nude woman and links to 17 additional images. exhibit 24, page 7.

d. I clicked on the link to *thom07.jpg*. This brought up an image of a nude woman. Exhibit 24, page 8.

e. I then clicked backed to the CyberBabes home page. Exhibit 24, pages 1-5. The last box in the first row of boxes has links to *Ginger* and *HERE*. Exhibit 24, page 2. I clicked on the link to *HERE*.

f. This immediately brought up five sexually explicit images of couples engaged in sex acts. Exhibit 24, page 9. A link to *More Pix!* appears on the page. I clicked on this link.

g. This immediately brought up four additional images of couples or groups engaged in sex acts.

Exhibit 24, page 10. A link to *More Pix!* appears on the page. I clicked on this link.

h. This immediately brought up two additional images of couples or groups engaged in sex acts. Exhibit 24, page 11. Twenty-one links appeared on this page to *CumParty01.jpg* through *CumParty21.jpg*. Each of these images can be accessed by a click of the mouse.

26. ***STeamRs Index***: Exhibit 25, the "STeamRs Index," provides access to a number of sexually explicit images. I had previously accessed this site through a search for sexually explicit materials conducted on or about March 5-6, 1996. I accessed this site again on April 4, 1996. The home page of the "STeamRs Index" includes a link to *Picture of the Week*. I clicked on this link.

a. This brought up a "Notice" page advising users under the age of 18 to leave the site. Exhibit 25, page 4. The page also provides a link to "*The Gallery*". I clicked on this link.

b. This link took me to the "STeamRs-Net Collection," which displayed several images of nude or partially nude women. Each image provides a link to a full-sized image. I clicked on the link to *Miss December*. Exhibit 25, page 6. This brought up an image of a partially nude woman seated at a computer keyboard. Exhibit 25, page 9.

c. I then clicked back to the "STeamRs-Net Collection," and clicked on the link to *35k-01/21*. Exhibit 25, page 5. This brought up a full-sized image of a nude woman laying across a bed.

27. ***Studman Collection***: Exhibit 26, "The Studman's Collection of Women" provides access to a number of sexually explicit images. I had previously accessed this site through a search for sexually

explicit materials conducted on or about March 5-6, 1996. I accessed this site again directly on April 4, 1996.

a. The home page of the "The Studman's Collection of Women" displays many images of nude or partially nude women in sexually explicit poses or engaged in sexual acts. Exhibit 26, pages 1-3. Each image is linked to a full-sized image. Under the caption "MORE of Anna-Marie Goddard," Exhibit 26, page 2, I clicked on the second image in the second row of images. This brought up a full-sized image of a partially nude woman. Exhibit 26, page 4.

b. I clicked back to "The Studman's Collection of Women" home page. Under the caption "MORE of Anna-Marie Goddard, Exhibit 26, page 2, I clicked on the last image in the first row of images. This brought up a full-sized image of a partially nude woman. Exhibit 26, page 5.

28. ***Bill's Fav Pics***. Exhibit 27, "Bill's Fav Pics," previously provided access to several of sexually explicit images. I had previously accessed this site through a search for sexually explicit materials conducted on March 6, 1996. When I attempted to access this site again on April 5, 1996, the pictures had been removed from the site. When I accessed the home page for "Bill's Fav Pics" on March 6, 1996, the page provided links to a number of sexually explicit images. Exhibit 27, page 1. I clicked on three of these links. One link brought up an image of a nude woman. Exhibit 27, page 3. Another link brought up an image of a partially nude woman. Exhibit 27, page 4. Another link brought up an image of a nude woman. Exhibit 27, page 5.

V. ***Web Search for "Little Women"***

29. Using the WebCrawler search engine, I searched for term "little women." The first hit on this search was *See hot pictures of naked women!. See* Exhibit 28. I clicked on this link. This brought up a page that had simply a *Click Here* link. Exhibit 29, page 1. I clicked on this link.

30. *Cyberporn Magazine*: This brought up the "CyberPorn Adult Online Magazine." This page includes information "warning" the user that adult materials are available on the site. The page also contains a link called *I certify that I am an adult. Enter CyberPorn.* Exhibit 29, page 2. I clicked on this link.

a. This brought up a page containing links to issues of "CyberPorn Adult Online Magazine," including *April 1996 Issue.* Exhibit 29, page 3. I clicked on this link.

b. This brought up "CyberPorn Adult Online Magazine's" Home Page. This page offers a series of links to materials in the April issue of the Magazine. *See* Exhibit 29, page 4. I clicked on a link to *Get April's instant password here!* This brought up a page providing information on how to obtain a password to access the Magazine. Exhibit 29, pages 6-8. The page explains several means of obtaining a password, including the Magazine's 900 telephone number, the CyberCash Secure Internet Payment System, a First Virtual Account and use of Redi-Check Secure Pay.

c. I then returned to the home page for "CyberPorn Adult Online Magazine." I could not access images from the Magazine without a password. However, near the end of the home page is a link to *CyberPorn's Special Links.* Exhibit 29, page 5. I

clicked on this link. This brought up a page of "CyberPorn's Choice Links." Exhibit 29, page 8. I clicked on this link. "CyberPorn's Choice Links" provides links to sites offering sexually explicit materials, including *Danni's Hard Drive.* Exhibit 29, page 8. I clicked on the link to *Danni's Hard Drive.*

31. ***Danni's Hard Drive***: This brought up a page called "Welcome to Danni's Hard Drive!" Exhibit 30, page 1. This page includes a link to proceed on this site (in the image of a woman's breast). I clicked on this link.

a. This brought up a page advising the user that "erotic materials" are available on the site. Exhibit 30, page 2. A paragraph beginning *I am at least 18 years of age . . .* links the user to the next page. I clicked on this link.

b. This brought up a page titled "Danni's Hard Drive," Exhibit 30, page 3, which includes several links to other pages of the Web site. I clicked on the link to *Picture of the Week.* This brought up an image of a partially nude woman. Exhibit 30, page 4. I clicked back to the page titled "Danni's Hard Drive." Exhibit 30, page 3. I clicked on a link to Danni Ashe.

c. This brought up an image of a partially nude woman. Exhibit 30, page 5. This page contains several additional links, including one to *Photo sets.* I clicked on this link.

d. This brought up a page of links to 23 images of nude or partially nude women. Exhibit 30, page 6. I clicked on the link to *PINK SWEATER.* This brought up an image of a partially nude woman. Exhibit 30, page 7.

e. I then returned to the page titled "Danni Ashe." Exhibit 30, page 5. At the top of this page is a link to the *HOT BOX.* I clicked on this link.

32. ***Hot Box***: The *HOT BOX* link brought up a page titled "Hot Box," Exhibit 31, page 1, which includes an image of a partially nude woman. This page includes a link: "I'm a Hot BOX *Member*." I clicked on this link.

a. This brought up a page with an image of a partially nude woman. Exhibit 31, page 2. At the bottom of the page is a link to *Subscribe to the Hot BOX*. I clicked on this link. This brought up a page describing "Hot BOX Subscription Options," Exhibit 31, page 3. A link on the page brought up a screen of Hot Box membership information. Exhibit 31, pages 4-5.

b. I returned to the "Hot BOX Subscription Options" page, Exhibit 31, page 3, and clicked on a link to *MODELS*. This brought up a page of "Models" and includes links to 52 images. Exhibit 31, page 6. I clicked on the link to *Fantasia*. This brought up an image of a partially nude woman. Exhibit 31, page 7. Other images of nude or partially nude women also are linked from the "Models" page.

VI. ***Web Search for "Jasmine"***

33. Using the WebCrawler search engine, I searched for term "Jasmine," the name of a character in the Disney movie "Aladdin." This search brought up a number of sites, many of which did not contain sexually explicit material. Exhibit 32. However, among the first 25 hits is a link to *Chip's Erotic Toon and Anime Page*. I clicked on this link.

a. This brought me to a page titled "Chip's Erotic Toon and Anime Page." The page contains a sexual image of three female characters from Walt Disney animated films, including Jasmine from "Aladdin" and Ariel from "The Little Mermaid." Exhibit 33, page 1.

I clicked on the link to *Aladdin and Jasmine, doggy style*.

b. This brought up a sexual image of the animated characters Aladdin and Jasmine. Exhibit 33, page 4.

c. I clicked back to the page titled "Chip's Erotic Toon and Anime Page" and clicked on the link to *Pocahontas, in the forest*. Exhibit 33, page 2. This brought up a sexual image of the animated character Pocahontas, from the film of that name. Exhibit 33, page 5.

d. I clicked back to the page titled "Chip's Erotic Toon and Anime Page" and clicked on the link to *Belle and the Beast, enjoying Belle's chest*. Exhibit 33, page 1. This brought up a sexual image of the animated characters Belle and the Beast from the film "Beauty and the Beast."

34. I clicked back to the WebCrawler search result for the term "Jasmine" and clicked on a link to *X-traordinary Talk!* Exhibit 32, page 2. This brought up a page titled "X-traordinary talk," which describes the site as offering "Fem-Dom Erotica." Exhibit 34, page 1. I clicked on a link under "Cassettes" to *Mistress Jasmine Series*. This brought up text descriptions of cassette series that can be purchased at the site. The language used describes sexual activities and organs in explicit detail.

VII. ***Web Search for "Sleeping Beauty"***

35. Using the WebCrawler search engine, I searched for term "Sleeping Beauty." This search brought up a number of sites, many of which did not contain sexually explicit material. Exhibit 35. However, among the first 10 hits is a link to *Beauty's World*. I clicked on this link.

a. This brought up a page titled "Beauty's World." Exhibit 36, page 1. The page advertises "The Complete Internet Sex Resource Guide." I clicked on the link to *CISRG*.

b. This brought up a page of links to sites offering information and materials that appear to be related to sexual activities. Exhibit 36, pages 3-5. At the bottom of this list is a link to *Sex Related FTP Sites*. I clicked on this link.

c. This brought up a list of FTP sites containing information and materials that appear to be related to sexual activities. Exhibit 36, pages 6-7. Near the bottom of this list is a link to *INTERNET NEWSGROUPS*. I clicked on this link.

d. This brought up a list of links to sex-related Internet newsgroups sites, including links to the alt.binaries and alt.sex hierarchies. Exhibit 36, pages 8-10. *See infra*.

B. ***Bulletin Board Services*** (Tab VIII)

36. My initial search for the term "XXX" using the YAHOO! search engine also yielded links to the Web sites for several Bulletin Board Services (BBSs). *See* Exhibit 37, page 6. I clicked on the link to *South Shore Secrets BBS*.

a. This brought up a page titled "Enter the World of . . . South Shore Secrets BBS." Exhibit 38, page 1. This is the home page of the Web site for this BBS, but it is not the BBS itself. On the Web site homepage, two images of partially nude women appear on the page. The page includes a link in the statement "We have *thousands of files* online." I clicked on this link.

b. This brought up a page titled "THOUSANDS of Files at SSS." The page includes four images of nude

or partially nude women. Exhibit 38, pages 3-6. The page also includes descriptions of the types of file areas on the BBS.

c. I clicked back to the page titled "Enter the World of . . . South Shore Secrets BBS" and clicked on the link to *Free Trial*. Exhibit 38, page 2. This brought up a page titled "Call NOW for a FREE Trial!! The page featured three images of nude or partially nude women. Exhibit 38, pages 7-9.

d. I then clicked on the link to *MatchMaker Questionnaires*. This brought up a page titled "MatchMaker Services," which depicted a partially nude woman. Exhibit 38, page 11.

e. I clicked back to the page titled "Enter the World of . . . South Shore Secrets BBS" and clicked on the link to *message areas*. Exhibit 38, page 1. This brought up a page titled "More than 80 Sexual & Non-Sexual Message Areas" which displayed two images of nude women. The page also includes descriptions of the types of sexually explicit message boards available on the BBS. At the end of the page is a telephone number to dial the BBS by modem and a password for "guests" to use to access the site for a 2-day "trial" period. Exhibit 38, pages 12-15. I dialed into the BBS and used the guest password to gain access.

f. Dialing into the BBS brought up a screen of information on how to join the BBS. The screen also tells the user how to obtain "FREE ACCESS" to the BBS for a two-day trial. I spent just about 15 minutes accessing the BBS during this "trial" period. The BBS provides instructions and a tutorial on how to view the sexually explicit material available, including how to move around on the BBS, how to access file areas, and how to download images. It also describes

some of the material available on the BBS. Exhibit 38, pages 16-25.

37. ***Dirty Hacker BBS***: Using the YAHOO! search engine, I searched for the term "adult porn." This search yielded a number of links to sites containing sexually explicit material. Exhibit 39. I clicked on the link to *The Dirty Hacker BBS*. exhibit 39, page 2. This brought me to the Web site for "The Dirty Hacker." Exhibit 40. I clicked on the icon link captioned "What is TDHBBS?"

a. This brought up a page advising users that "The Dirty Hacker BBS" is "an ADULTS ONLY Hardcore Porn BBS." This page further advises: "Due to the explicit sexual content of our literature, GIFs and animations, we can not allow access to any of this material until a signed copy of our subscription form (bulletin #14 on the BBS), and a copy of your driver's license, passport, or birth certificate are on file in this office." Exhibit 40, page 2. An icon of a nude woman appears below this statement provides a link to additional locations on the Web site. I clicked on the icon.

b. This brought up a page titled "TDHBBS Download Directories." The page provides an alphabetical list of links to sites containing sexually explicit material. Exhibit 40, pages 3-6. I clicked on icon next to the caption "Gif's Beginning With The Letter A. Exhibit 40, page 3.

c. This brought up a list of images available on the BBS. The images cannot be viewed without dialing into the BBS, but the Web site contains explicit textual descriptions of the images of sexual activity that can be viewed on the BBS. Exhibit 40, pages 7-25.

d. I attempted to dial into The Dirty Hacker BBS. I could not access this site without a password. Exhibit 40, pages 26-27.

C. ***USENET Newsgroups*** (Tab IX)

38. Using the Lycos search engine, I searched for the terms "porn pictures." This brought up a listing of sites advertising their content as sexually explicit. I clicked on the link to *alt.binaries.pictures.erotica.pornstar*. Exhibit 41, page 1.

a. This brought up a page with individual links to *alt binaries pictures erotica pornstar*. Exhibit 41, page 7. The user can click on any one of these as individual links to reach a larger or more focused newsgroup collection containing sexually explicit images. I clicked on the link to *pornstar*. A listing of materials available in the "alt.binaries.pictures.erotica.pornstar" newsgroup appeared on the screen, with links to images available on this newsgroup. I clicked on one of the links, which brought up an image of a nude woman. Exhibit 41, page 8.

b. I clicked back to the screen of individual links to *alt binaries pictures erotica pornstar* and clicked on the link to *pictures*. Exhibit 41, page 7. This brought up a listing of all of the available newsgroups in the alt.binaries.pictures hierarchy. Exhibit 41, pages 9-10.

c. I clicked back to the screen of individual links to *alt binaries pictures erotica pornstar* and clicked on the link to *erotica*. Exhibit 41, page 7. This brought up a listing of all of the available newsgroups in the alt.binaries.pictures.erotica hierarchy. Exhibit 41, pages 11-12. I clicked on the link to *alt.binaries.pictures.erotica.female*. This brought up a listing of images available in this newsgroup. I clicked on one

of the links, which brought up a screen with 10 images of nude or partially nude women. Exhibit 41, page 13.

d. I clicked back to the listing of all of the available newsgroups in the alt.binaries.pictures.erotica hierarchy. Exhibit 41, pages 11-12. I clicked on the link to *alt.binaries.pictures.erotica.redheads*. This brought up a listing of individual links to *alt binaries pictures erotica redheads*. Exhibit 41, page 14. I clicked on the link to *redheads*. This brought up a listing of images available in this newsgroup. I clicked on one of the links, which brought up a screen with an image of a partially nude woman. Exhibit 41, page 15.

e. I clicked back to the listing of all of the available newsgroups in the alt.binaries.pictures.erotica hierarchy. Exhibit 41, pages 11-12. I clicked on the link to *alt.binaries.pictures.erotica.breasts*. This brought up a listing of individual links to *alt binaries pictures erotica breasts*, which displayed a listing of 2 newsgroups. Exhibit 41, page 16. I clicked on the link to *alt.binaries.pictures.erotica.breasts*. This brought up another listing of individual links to *alt binaries pictures erotica breasts*. Exhibit 41, page 17. I clicked on the link to *breasts*. This brought up a list of images available in this newsgroup. I clicked on one of the links, which brought up a screen with an image of a nude woman. Exhibit 41, page 18.

f. I clicked back to the listing of all of the available newsgroups in the alt.binaries.pictures.erotica hierarchy. Exhibit 41, pages 11-12. I clicked on the link to *alt.binaries.pictures.erotica.blondes*. This brought up a listing of individual links to *alt binaries pictures erotica blondes*. Exhibit 41, page 19. I

clicked on the link to *blondes*. This brought up a list of links to materials available in this newsgroup.

i. This newsgroup contained a direct link back to a Web site, *http://www.cris.com/~heatl/*, with a click of the mouse. The Web site for HEAT claims it is "an adult service featuring the HOTTEST women doing the HOTTEST things for your viewing PLEASURE! Best of all, the site is virtually FREE!" Exhibit 41, page 20.

ii. This newsgroup also contained links to sexually explicit images. I clicked on one of these links, which brought up an image of a partially nude woman. Exhibit 41, page 21.

g. I clicked back to the listing of all of the available newsgroups in the alt.binaries.pictures.erotica hierarchy. Exhibit 41, pages 11-12. I clicked on the link to *alt.binaries.pictures.erotica.male*. This brought up a listing of individual links to *alt binaries pictures erotica male*, which listed two linked newsgroups. Exhibit 41, page 22. I clicked on the link to *alt. binaries.pictures.erotica.male*. This brought up another listing of individual links to *alt binaries pictures erotica male*. Exhibit 41, page 23. I clicked on the link to *male*. This brought up a list of links to materials available in this newsgroup. I clicked on one of these links, which brought up an image of a nude man. Exhibit 41, page 24.

39. I conducted various searches for sexually explicit material on or about March 5-8, 1996. In the course of these searched, I linked to the images which appear as Defendant's Exhibits 70 to 79 and downloaded these images.

OPINION TESTIMONY

40. Based on the foregoing examples of sexually explicit sites and materials online, in my opinion it would be easy for minors operating in an unrestricted online environment—with even a beginner's understanding of how to search for information on the Internet—to find sexually explicit sites. Such a user who is actually seeking sexually explicit material need only type in words or letters on a search engine, such as "XXX" or "XXX Sex" or "Cyber Babes" or "Adult and Porn," to get multiple "hits" on sites which clearly present themselves as sexually explicit. This is by no means an exhaustive list of key words that would produce a list of sexually explicit sites. In addition, many sexually explicit sites themselves provide links to many other sites—as evident by the Steamy Erotic Links site. *See* Exhibit 18. The connection takes a few seconds to minutes (depending on factors such as modem speed and/or how busy the internet is). All of this material is readily obtainable through a point and click of a mouse.

41. It is also in my opinion that, in an unrestricted environment, sexually explicit sites can easily be found even if one is not looking for them. This is evident from the search for "little women." The results for searching under this term will vary depending on the search engine used. For example, a search for this term under the "Infoseek" guide, *see* Exhibit 28, pages 2-3, does not appear to turn up a sexually-oriented site until the fifth link. However, as noted, the very first link for the "little women" search on Web Crawler led to multiple links of sexually explicit sites—including the same "cyberporn.com" site pro-

duced by the Infoseek search. *See* Exhibit 28, page 1. Similarly, the use of the term "Jasmine"—a character from the Disney Movie Aladdin—also led to sexual cartoon images of the Disney characters themselves, as well as a link to the "X-traordinary talk" site which contained graphic descriptions of sexual activities. Exhibits 33 and 34. For this reason, in my opinion it is certainly possible for users to unexpectedly encounter sexually explicit material through a seemingly innocuous search—even one thought suitable for children.

42. It is, of course, possible to attempt to narrow the specific search terms in order to limit the scope of the resulting list of hits. Search engines allow the user to add words to focus the specific area of interest. However, search engines are developed to respond broadly to keywords by providing a maximum number of responses with minimum keyword input. This is intended to preclude users from typing in a word that would exclude information they may be searching for. My own practice and experience as a regular user of the Internet to conduct online research is to cast search terms more broadly and then, having reviewed many different sites, add search terms at that time to focus the search to a more specific area of interest. In addition, some users may not be as familiar with how to limit the search in order to avoid unexpected hits on sites that contain sexually explicit material.

43. In addition, based on the foregoing results, in my opinion sexually explicit sites are widespread on the Internet. I do not have a precise count of the number of such sites—which, indeed, would be nearly impossible given the constant state of growth and change in the entire Internet. I also do not have a

"percentage" of such sites of all the information on the Internet, which in my opinion would be an irrelevant and meaningless figure. Simply put, based on my experience in investigating such sites, there is a substantial and growing number of sexually explicit sites that easily exceeds several thousands. Moreover, each separate site may have multiple images, *see* Exhibit 20, page 16 (Nikkitta), or multiple links to other sites. *See, e.g.*, Exhibits 17, 18. Trying to calculate the exact quantity or percentage of sexually explicit sites, in my view, loses sight of the simple fact that there is an enormous quantity of such material to access and view.

SURFWATCH (TAB X)

44. I was provided a copy of the Surfwatch software that plaintiffs provided to the government. As described below, on April 5, 1996, I undertook a brief, limited experiment to determine whether access to certain specific sites on the World Wide Web that I was aware contained sexually explicit material was in fact blocked by Surfwatch.

45. First, I loaded the version of Surfwatch for the "Windows 3.1" operating system. During the installation process, the most recent update of "blocked sites" was automatically updated on April 5, 1996. I then tested to see if the program was operating by checking an indicator on my computer screen which displays the "icon" for applications that were running, and this indicated that Surfwatch was running. As a further test, I then first sought to access the site for Playboy Magazine, called "Playboy.com." Access to this site was blocked by Surfwatch.

46. Next on April 5, 1996, I proceeded to type into my computer the specific addresses of a number of

sites which contained sexually explicit material. The first such sites were derived from the April 1996 edition of Playboy Magazine, which had a cover story entitled "Women of the Internet." The excerpted pages from the published magazine are set forth at Exhibit 42.[1] Working off of these printed pages, I searched for the Web sites of some of the models depicted, including, http://amore.com (Exhibit 42, page 3); http://www.lucylipps (Exhibit 42, page 5); and http://www.danni.com (Exhibit 42, page 6) by typing these "web addresses" into the computer. Two of the sites were blocked by Surfwatch, but, with Surfwatch running, I was able to gain online access to "amore.com" and, specifically, to the screen set forth at Exhibit 43, page 3 which depicts one of the models contained in the printed April 1996 edition.

47. I also sought to gain access to a sexually explicit site which I had previously located in a prior search. I typed the site address into the URL locator portion of the Web browser. The "commercial name" of the Web site is "RozDesigns Web Heaven" located at http://pilot.msu.edu/user/rozwadow/webhevn.htm. When I entered this web address, this site appeared on my screen with Surfwatch running. I then clicked on the menu of images for three of the models—which contained several images a user can choose from. I then clicked on one image for each of the models. I also clicked on the "Secret Pic of the Week!" Each nude image of the model appeared on the screen while Surfwatch was running on April 5, 1996, *see* Exhibit

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[1] Unlike the other material attached hereto as exhibits, Exhibit 42 is NOT a print-out of material available online but a copy of the actual printed pages of the magazine.

44, indicating this site has not yet been blocked by Surfwatch.

48. I then proceeded to check some of the various links set forth on "Steamy Erotic Links" at Exhibit 45. Access to the listing of links was itself not blocked by Surfwatch. While I did not check every one of the "links" listed at Steamy Erotic Links at Exhibit 45, I did check over 35 sites—about the first two and a half pages on the list. Among the links listed on this index, the "The Wonderful World of Erotica" and "The Keeper"—*see* Exhibits 46, 47—were not blocked by Surfwatch on April 5, 1996. In addition to these, four other sites that appear to have originated overseas were also not blocked by Surfwatch on April 5, 1996, including "Fuzz Butts," "Babes," "Daily Babe Test," "Sex-a-Phone," and "Amateur of the Week."

49. I next checked whether several other sites that have discussed above and attached hereto as exhibits were blocked while by Surfwatch was running on April 5, 1996, by typing in their "Web address."

a. Surfwatch did not block the site designated as "Pix Previews." This site was first found by linking off of the CyberBabes Web site. *See* Exhibit 24. When I typed its address separately with Surfwatch running, it was not blocked. *See* Exhibit 49.

b. Surfwatch also did not block the first page of the "Honey Page" at http://www.apillio.com" at Exhibit 50 (also previously identified at Exhibit 11).

c. Surfwatch also did not block the "Amateur Hardcore" site at http://www.webpower.com/amateurs/ at Exhibit 48 (also previously identified at Exhibit 14).

d. Surfwatch also did not block "The FunPalace" site and sample images contained. This site was first

found through the YAHOO! search for the term XXX. *See* Exhibit 2. When I typed its address separately with Surfwatch running, it was not blocked. *See* Exhibit 51 (also identified at Exhibit 4). In addition, Surfwatch did not block the sample graphical images set forth on pages 2-3 of Exhibit 51. Examples of these images are also contained at Exhibit 4, pages 5-6.[2]

e. Surfwatch also did not block "The Alternative Page." Exhibit 52. A part of this site was first found by linking off of the CyberBabes Web site to: **http://www.txdirect.net/users/aaron**. *See* Exhibit 24, page 7. When I typed this address separately with Surfwatch running, it was not blocked. Exhibit 52. I selected an image different from the one at Exhibit 24, page 7, and clicked it on, as shown at Exhibit 52.

50. The limited check of whether Surfwatch blocked some of the sites identified above was undertaken without any prior knowledge on my part as to whether the Surfwatch would in fact block the Web addresses I entered into the computer. Indeed, as noted, several sites I entered, such as Playboy.com and others listed on the "Steamy Erotic Links" Web site, were in fact blocked by Surfwatch during the course of my check. However, working over the course of just a few hours, I located at least 9 domestic sites (and four sites that apparently originated

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[2] During my deposition on April 8, 1996, I did not recall whether the images listed at Exhibit 51 were in fact blocked by Surfwatch, because I had not attached sample images to Exhibit 51. I have since gone back and determined that, with Surfwatch running, these images were not blocked on April 9, 1996. See Exhibit 51, pages 3-4 (also identified at Exhibit 4, pages 5-6).

overseas) containing sexually explicit material that were not blocked by Surfwatch.

51. In addition, I understand that among the methods Surfwatch uses to block sexually explicit sites is on the basis of specific "key words" such as "sex" that may be located in the Web address. I was not previously aware of Surfwatch's list of key words and, thus, did not seek to deliberately avoid such key words in Web addresses. In this limited check, I simply took the list of Web sites found in my prior, unrestricted search, and sought to find a few examples that were not blocked by Surfwatch.

52. In my opinion, with additional time and searching, more sexually explicit sites that are not currently blocked by Surfwatch would be identified. This is due in part to the fact that the number of such sites continues to grow. New sites are added which may not have been previously identified by Surfwatch or which may not contain one of the current "key words" in its Web address that Surfwatch blocks.

53. Also, to the extent a Web site is being blocked by Surfwatch based on the recognition of a key word in an existing file or directory, I believe that such file or directory name may easily be changed. Under this scenario, the site would not be blocked by Surfwatch unless it was again specifically identified. For example, part of the site identified at Exhibit 16, "The Studman's Homepage," was blocked by Surfwatch when I conducted my limited experiment. This site is identified by the domain name, directory, and subdirectory of: "**weiss.che.utexas.edu/~poland**/pics/". Surfwatch blocked access to the "Supermodels" files which contains the images at Exhibit 26, pages 2-5. However, Surfwatch did not block the Studman's home page at Exhibit 26, pages 7-9, which is designated by the *same* domain name and directory of "**weiss.che.utexas.edu/~poland**/master.html." This indicates that this site was being blocked at a level below the domain address. Under this blocking scenario, sexually explicit images may be moved into a separate subdirectory or a file name. For example, at Exhibit 26, page 8, the Studman's site has a link to a "SURPRISE Pic of the Week" updated on March 19, 1996. The subdirectory and file for this picture is "weiss.che.utexas.edu/~poland/**icon/sample.gif**". Sexually explicit images could be included in a separate file such as this, and until such a separate file were identified, it would not be blocked by Surfwatch.

54. As a law enforcement officer who has been involved with a number of investigations concerning sexually explicit materials, I support the efforts by Surfwatch and other similar entities that are providing parents a tool to shield children from access to sexually explicit material online. In my opinion, however, user-based controls, while commendable, will inevitably be trying to keep up with the addition of new and revised sites, and in the long term may face attacks from those who may distribute information on how to disable the program. Also, based on my experience in law enforcement in this area, which includes teaching classes to officers at beginner levels, and also substantial anecdotal information from talking to parents about their children's use of computers, my opinion is that many parents do not have the same level of sophistication with computers as many minors do today—nor the time to supervise their children's use of computers online. For this reason, in my opinion, relying on parental controls and supervision will only be a part of the solution to restricting

access by minors to material that is inappropriate for them.

I swear under penalty of perjury that the foregoing is true and correct:

DATE: April 9, 1996

/s/ HOWARD A. SCHMIDT
S.A. HOWARD A. SCHMIDT
Office of Special Investigations
Computer Crime Investigations
United States Air Force

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civ. A. No. 96-0963

AMERICAN CIVIL LIBERTIES UNION, ET AL., PLAINTIFFS

v.

JANET RENO, IN HER OFFICIAL CAPACITY AS
ATTORNEY GENERAL OF THE UNITED STATES,
DEFENDANT

CIV. A. No. 96-1458

AMERICAN LIBRARY ASSOCIATION, INC., ET AL.,
PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
DEFENDANTS

DECLARATION OF DR. DAN R. OLSEN, JR.

I, Dan R. Olsen, Jr., do hereby state as follows:

1. I am currently Chair of the Computer Science Department at Brigham Young University (BYU) in Provo, Utah. I have been a member of the faculty at BYU since 1985, holding successive positions as Assistant Professor (1985-86), Associate Professor (1986-90), Professor (1990-present), and serving continuously since 1992 as Chair of the Department. The

Computer Science Department at BYU consists of 22 faculty and 700 students.

2. As of January 1996, I have been appointed as Director of the Human Computer Interaction Institute at Carnegie-Mellon University in Pittsburgh. In that capacity, I expect to be involved in user interface research and interaction over the Internet. Beginning in July 1996, I expect to be on leave from BYU for the duration of my appointment at Carnegie-Mellon.

3. My educational background includes a Ph.D. in Computer and Information Science from the University of Pennsylvania (1981), an M.S. in Computer Science from BYU (1978), and a B.S. in Computer Science from BYU (1976). Prior to joining the faculty of BYU, I held the position of Assistant Professor at Arizona State University (1981-84). I also worked at the Burroughs Corporation as an Engineering Programmer (1978-80).

4. My principal areas of research and teaching include: (i) network based interaction; (ii) automatic generation of graphical user interfaces; (iii) visual and graphical programming systems; (iv) high level programming languages; (v) computer graphics. I have also worked extensively on electronic libraries for genealogical research.

5. My curriculum vitae (attached hereto) lists my authorship of 40 principal publications, including a work entitled *User Interface Management Systems: Models and Algorithms* (Morgan Kaufman Publishers: San Mateo, California 1992).

6. Specifically with respect to the Internet, the World Wide Web, and other "on-line" applications: (i) "Interactive Net-Services on the WWW [World Wide Web]" (June 1995); (ii) "Distributable Interactive

Objects" (June 1995) ; (iii) "Implementing a Graphical Multi-User Interface Toolkit" (Sept. 1993); and (iv) "Software Architecture for Digital Family History Libraries" (available online at http://FHiTL.cs.byu.edu/ FHiTL/).

7. As a faculty member at BYU, I have been responsible for obtaining approximately $2 million in funded research projects in the field of computer science, from such diverse sources as the National Science Foundation, Novell, WordPerfect, Digital Equipment Corporation, IBM, and the Utah State Center of Excellence in Computer Based Education Technologies.

8. My professional activities include serving as Editor in Chief of the Association for Computing Machinery (ACM) Transactions on Computer Human Interaction (1992-present); Associate Editor, Human Computer Interaction (1990-present); as well as a series of positions as Conference Chair, Program Chair, and Program Committee Member on various symposia hosted by ACM's Special Interest Group on Graphics (SIGGRAPH), Special Interest Group on Computer Human Interaction (SIGCHI), and on the User Interface Software and Technologies (UIST) conference.

9. In the course of my duties as Chair of the Computer Science Department faculty, as well as in my professional research interests and other duties, I have developed substantial expertise relating to the technical standards and protocols adopted for the Internet. As part of this research I have developed several client-server systems that assist people in interacting over the Internet. This has included developing special purpose protocols, exploitation of the World Wide Web, and integrating research software

with World Wide Web server and client software. I am knowledgable concerning the major Internet applications in general use today, including those referenced in the Joint Stipulation of the parties to this consolidated litigation (filed with the Court on March 19, 1996) ("Jt. Stip.").

10. In preparation for my direct testimony by way of this written declaration, I specifically have reviewed portions of the hearing transcript of the first two days of testimony on plaintiffs' combined motions for a preliminary injunction (March 21 and 22, 1996), as well as the deposition testimony and declarations of Mr. Scott Bradner, Prof. Donna Hoffman, and the first day of deposition testimony of Mr. Albert Vezza. I have also reviewed various briefs and other filings in these actions. I base this declaration on my own knowledge and experience, as supplemented by analysis conducted with colleagues at BYU.

I. NATURE OF THE INTERNET

11. To understand the Internet one must understand the way in which computers cooperate to achieve communication, the types of communication that are possible and the ways in which users of the Internet can reference and access materials.

A. *The U.S. Government Founded the Internet*

12. The Internet is not a spontaneously produced anarchic community. The Internet is the product of years of government investment and support. Arpanet was created as a tool for the military and to support military research and contractors. When the

value was perceived as being larger than for military purposes alone, Arpanet was superseded by NSFnet, again with government sponsorship and support. This nurturing influence of the federal government is documented in an article by Vint Cerf, one of the early Internet developers (*see* http://www.skywriting.com/cerf.html). Moreover, the history of the Internet has shown that standards developed in the United States frequently are adopted around the world. The privatization of the Internet is a very recent phenomenon.

B. *How Communication Occurs on the Internet*

13. In order for communication to take place over the Internet two pieces of software are required: the *client* and the *server*. Client software is what most users will see when they interact with the Internet. This includes software such as web browsers, telnet (to log onto other machines), mail programs, etc. Server software is rarely seen by ordinary users. This software generally runs continuously on some machine and waits for requests from client software at other machines across the Internet. In order for communication to occur, client software must connect, via the Internet with server software, make a request of the server and receive a response.

14. Client/server communication in various forms is the essence of most Internet software. In order for client software to communicate with a server, they must both be adhering to some standard protocol. The protocol is the communication language which defines how each side can talk to the other. For Internet communication to occur, both the client software and the server software must correctly adhere

to the standard protocol. If a client refuses to connect and make a request, no communication occurs. If a server refuses to respond to a request, no communication occurs. If one or the other does not obey the standard, no communication occurs.

C. *Standards are the Heart of the Internet*

15. A major key to the success of the Internet is the use of standards and the standards making process. The Internet does not dictate how various vendors, students, professors or users implement software which uses the Internet. The success of the Internet is that the steering organizations have defined a set of communications standards and left the implementation strategies open. Without such standards and the standards process there is no Internet. The Internet is not anarchy. Thus, the setting of additional standards would not be a novel kind of activity.

D. *Types of Communication*

16. To further understand how people use the Internet it is helpful to define four classes of use: information serving, direct messaging, message broadcast, and specialized uses. Information serving occurs when some information provider makes information available on the Internet using some standard server protocol and software. Examples of this are File Transfer Protocol (FTP), HyperText Transfer Protocol (HTTP) and Gopher. *See* Jt. Stip. ¶¶ 30-48. The mechanisms used for serving or publishing information in these three protocols are slightly different but the essential nature of the communication is the same. The information provider places the information in such a way that it is available to the server software. The server responds to client requests and makes that information available to the user.

17. A related form of information access is "telnet," where one can remotely log on to a computer to obtain information. *See* Jt. Stip. ¶ 29.

18. Direct messaging is when some individual creates a message which is sent to a particular individual or some selected group of individuals. The prime example of this is e-mail. *See* Jt. Stip. ¶ 23. This type of communication has a strong similarity to phone communications, in the sense that one may or may not know who is on the other end of the line but the conversation is highly restricted in terms of who is participating.

19. Message broadcasting occurs when a user creates a message and has it sent to a large group of people who probably are not known to the sender and whose identity is generally out of the control of the sender. Examples of this are e-mail to e-mail exploders such as "listservs" or posting to Usenet newsgroups (net news). *See* Jt. Stip. ¶¶ 24-26. In such communications, the sender knows the purpose for which the newsgroup or e-mail list was created, but in normal usage does not know who the individual readers will be. Typing a message in an Internet chat room is a similar form of message broadcast. *See id.* ¶ 27.

20. The final type of communication on the Internet consists of specialized protocols generally not seen by users, such as name negotiation or system configuration information. Also included in this group are protocols for coordinating manufacturing,

processing monetary transactions and others. These types of communication are not generally for personal or organizational speech and can be ignored for the purposes of this case.

21. It is worth pointing out that simply because a particular protocol is technically inappropriate for some kinds of communications over the Internet does not mean that those communications are necessarily hindered. For example, it is technically impractical for a library to make its card catalog readily usable via FTP. It is quite easy, however, to do this using HTTP. In terms of the content of the catalog, however, FTP and HTTP are functionally identical. Conversely, HTTP is technically not an appropriate communication medium for very large files. FTP does a much better job for large files.

E. *Internet Naming*

22. A key point I wish to emphasize is that naming is a fundamental component of the Internet and the mechanism by which almost all communications are established. I will show in a later section how a simple convention within the standard Internet naming mechanisms can support a wide variety of content identification techniques.

23. In Internet communication almost everything has a textual name. The only notable exception to this is Internet Protocol addresses (known as IP addresses), which are integer numbers. In fact IP addresses are infrequently used because a site or domain name (which is textual) is easier to use. As Mr. Bradner has testified, *see* Hearing Tr. 22:21 (Mar. 21, 1996), future IP addresses will have four times as many digits and will be used even less frequently by

ordinary users. In order to request a service, contact a computer, access a file, or mail to a user, one must specify a name. Such names are essential to Internet communication because they are the means by which users express their intentions in a form that Internet software can understand.

24. A key innovation of the World Wide Web is the Universal Resource Locator (URL). The URL standard unified the naming of a large number of the Internet resources and protocols already in existence. The URL makes it possible to reference explicitly individual pieces of the Internet universe of information and services.

25. The following are examples of possible URLs. The nature of these names will be discussed later in this section of my declaration.

An HTML document on an HTTP site
"http://mit.edu/docs/AboutMIT.html"
Domain name for the server: "mit.edu"
Directory name: "docs"
File name: "AboutMIT.html"
A file on an FTP site
"ftp://somewhere.busi.com/programs/calc.exe
Domain name for the server: "somewhere.busi.com"
Directory name: "programs"
File name: "calc.exe"
A news group
"news:soc.couples.wedding"
A collection of news groups: "soc"
A smaller collection: "soc.couples"
A news group: "soc.couples.wedding"

An e-mail address
"mailto: george@hitech.com"
A user name: george
A domain name for a computer: "hitech.com"
A file on a Gopher site
"gopher://www.where-are-u.edu/info-mac"
A domain name: "www.where-are-u-edu"
A file name: "info-mac"
A telnet session
"telnet://library.byu.edu/"
A domain name for the library's computer: "library.byu.edu"

As the above examples show, a large number of services are accessed via a simple naming mechanism. It is important to note that these names are naturally drawn from the individual protocols themselves. URLs, simply, provide a general way of naming all of them.

26. In the following sections I will discuss each of these types of names in more detail. Following that I will present a simple scheme for using such names to tag sexually explicit materials. There are possibly many other ways to accomplish this same goal—including using portions of the "Platform for Internet Content Selection" ("PICS") system described in the Jt. Stip. ¶¶ 49-53, and below.

27. *Domain names.* Domain names are used to specify computers, groups of computers, as well as some organizational information. Domain names provide a name outline for most of the computers publicly accessible on the Internet.

28. At the highest level, domain names are registered with InterNIC in the US (and other agencies in Europe and Asia), which ensures that such names are unique across the Internet. For example, Brigham Young University has the domain name "byu.edu" which is uniquely registered to the University. Other such global domain names are "aol.com" for America Online or, to use a real example, "cyberporn.com." Such global names are relatively easy to get.

29. The power of domain names, however, lies in the fact that only the global names are centrally registered. Each organization or individual that has registered a global domain name now has the power to create a whole range of names.

30. For example, BYU has allocated the name "cs.byu.edu" to its Computer Science Department and the name "math.byu.edu" to its Mathematics Department. The Computer Science Department has in turn used its name to allocate "issl.cs.byu.edu" as the domain name for the server in the Interactive Software Systems Lab with the name "lal.cs.byu.edu" being allocated in the Laboratory for Applied Logic. The Computer Science Department at BYU can create as many names for computers and services as it wants without consulting anyone else on the Internet for permission, as long as it appends its own domain name "cs.byu.edu" to the end.

31. Each individual piece (separated by ".") of a domain name consists of letters, hyphens or digits. *See* RFC 1035 (Internet standard for domain names). This gives managers great flexibility to create names for any purpose they choose.

32. *IP Addresses.* It is impossible to communicate with any computer on the Internet without knowing its IP address. Such IP addresses are currently 32

bit integers which are very difficult for people to remember and use. Internet protocols exist, however, for taking a domain name and looking up the IP address of the computer that it references. Such lookups are central to the functioning of the Internet.

33. It is also possible in most cases to use an IP address to obtain a domain name that corresponds to that computer. It is almost always possible for the owner of such a computer to make sure that the computer's IP address can be converted into a domain name. It is therefore not difficult for any server to make sure that the clients that it communicates with know the server computer's domain name. If, for example, a minor identifies Internet material by IP address, then any blocking software could ask for the domain name of the IP address and perform screening based on that name.

34. *Directory and file names.* Information serving protocols of the type which dominate the World Wide Web (HTTP, FTP and Gopher) function primarily in terms of files. On all such systems individual items can be arranged into groups, normally called directories or folders. All such files have names and can be grouped together in directories that have names. Directories themselves can also be grouped together to form larger collections. A given item is identified to an information server, such as HTTP, by naming all of the directories that the item is in, starting from the highest to the lowest.

35. Consider for example the universal resource locator (URL) "http://home.netscape.com/home/whats-new.html." This locator identifies a document called "whats-new.html." This document is found in a directory called "home" on a system named "home.netscape.com". There could be multiple files in this

directory, such as "whats-cool.html" and "netscape-galleria.html" which respectively have the URLs: "http://home.netscape.com/home/whats-cool.html" and "http://home.netscape.com/home/netscape-galleria.html."

36. In HTTP it is possible for information to look like a file to a client when in actuality it might be generated temporarily from some database. The point, however, is that for all information serving forms of communication, resources are named by individual items' names.

37. *News group names.* Newsgroups also have names. These names, like directory names and domain names, are arranged in a hierarchy which collects together related news groups. Note that each newsgroup has a name which is unique within its collection and each collection has a name which is unique within a larger collection. For example, the newsgroup "financial-aid" is in the "college" collection which is in the "soc" collection. The full name for this newsgroup is "soc.college.financial-aid".

38. *Mail names.* In order to send e-mail to someone, one must have a name for them. This almost always consists of a username@domain_name. For example "Freddy@cs.byu.edu" is the address of a fictitious user named "Freddy" who receives e-mail at a machine called "cs.byu.edu". On many systems the user names are assigned by the system administrators. On other systems such as America Online, the users themselves select their names provided the name is not already taken.

39. In some cases the name is not that of a user but is the name of a mailing list. For example there is a mailing list about Internet genealogy called "genweb@UCSD.EDU". This is the "genweb" mail-

ing list hosted at the University of California at San Diego. Mailing to genweb will actually cause the mail to be forwarded to all of the people who have registered their personal mail address as part of this mailing list.

40. *Internet Chat.* In Internet Relay Chat (IRC) every topic or "chat room" has a textual name. Users select the conversation that they want to be involved with by specifying the textual name. It is also possible to list such "chat rooms" by name. On many chat servers it is possible for users to create new "chat rooms" simply by typing a new name to enter that room.

F. *Summary of the Internet*

41. The essence of the Internet is standards. Without standards there is no Internet. This standards process and the fundamental standards on which the Internet rests were created with support of the U.S. Government, rather than randomly or spontaneously. Although the Internet today supports a blossoming array of types of communication and content being communicated, it is founded on a disciplined standards process.

42. Everything on the Internet of significance to normal users has a textual name by which it can be referenced. These names are fundamental to the functioning of the Internet and are found in one form or another in every kind of user-oriented Internet communication.

II. USING AVAILABLE TECHNOLOGY FOR ON-LINE CONTENT IDENTIFICATION

43. I will show that there is at least one simple mechanism for online content providers to identify or tag information they create, and that other solutions are also possible. These solutions require minimal, if any, new technology, use existing Internet protocols, and have no impact on materials deemed suitable for minors.

A. *Tagging of Sexually Explicit Material*

44. It is possible to tag sexually explicit material in a fashion that is simple for other Internet software to detect. This tagging scheme should also use existing Internet technologies. The purpose of this discussion is to show that such tagging is technologically simple by showing one way in which it could be done, without the government mandating how any particular tagging should be done. That is, implementation would be left to the Internet community and to the content providers themselves. The technique discussed here could be in place in a month or less.

B. *Creating Tags*

45. In order to tag sexually explicit content there must be some agreement upon a text, symbol or code which can be easily recognized and can be embedded in a large variety of Internet traffic. Exactly what this code should be is irrelevant to the argument. It is not even important that there be only one tag so long as the number of tagging schemes is not large.

46. For purposes of this discussion the string "-L18" will be used as an example. This is an acronym for "not Less than 18." This string was chosen because it is compatible with a variety of Internet standards, is easy to remember, easy to detect and not readily confused with other purposes. The strings "XXX," "X" or "adult" could be used just as easily. It should be left to the Internet community to make their choice as to what "tag" should be used.

47. A scheme could also be devised to encode varying tags depending on the nature of the material in question. One might create a multilevel scheme so as to identify material which is not sexually explicit, that would nevertheless be considered to require parental guidance.

48. The string "-L18" is compatible with the conventions and requirements for domain names, file names (*e.g.*, DOS, Macintosh, UNIX, Windows, NT), user names, and chat room names, as well as any other naming scheme that conforms to general Internet usage.

C. *Tag Uses*

49. The key to such a tag is that everything on the Internet has a name. The string "-L18," or other tag strings, can be added to any name to flag that item or collection of items as inappropriate for minors. This requires no new Internet technology. An extensive, but not exhaustive list of possible uses follows.

50. The mechanism described here can identify sites, directories, or individual items as sexually explicit, providing wide flexibility in the ways people structure their communications. By contrast, many

third party screening techniques, such as Surfwatch, block entire sites, not portions of them.

51. *Tagging sexually explicit sites.* The "-L18" string can be placed in any domain name to identify the materials served by that site as sexually explicit. For example, the site "www.cyberporn.com" could be renamed "www-L18.cyberporn.com". This would identify this particular site as "adult only." In the case of Cyberporn, the web site's owners may decide that everything that they do is sexually explicit and they do not want to worry about labelling anything. They could have registered the domain "cyberporn-L18.com" instead of "cyberporn.com." Any domain or site that Cyberporn wishes to create as part of its business will thus have "-L18" in its name and will be clearly identified as adult only.

52. Using this technique, InterNIC could also create adult only areas by using "L18" as a global domain name. In such a case Cyberporn could register the name "cyberporn.L18".

53. *Tagging sexually explicit files.* Instead of tagging entire sites, individual files can be tagged as sexually explicit. For example, suppose there is a file whose URL is "http://www.adult.com/nakedwomen.html". Suppose further that the site "www.adult.com" was also serving materials which were not sexually explicit. The content provider would not want to have their entire site identified as sexually explicit. Instead they could rename the file "nakedwomen.html" as "nakedwomen-L18.html". The file is clearly tagged as sexually explicit without labelling the entire site.

54. *Tagging directories of sexually explicit files.* It may be useful to create an "adult-only" area within a particular site. Take for example the URL "http:/

/www.aol2.com/erotica/ nakwom.htm". It is probable that the owners of the "www.aol2.com" site do not want to make the entire site restricted only to adults. They also may not want to label every single sexually explicit file. In fact, they have created a directory called "erotica" in which to store such material. Changing this directory's name to "erotica-L18" clearly tags it as sexually explicit. Since computers cannot actually read (they only match characters) the tag "-L18" is much easier to detect than trying to enumerate a list of "marketing words," such as "erotica," that content providers may use in their directory names. (The existence of such a tag would also prevent mistakenly identifying an information page on "breast cancer" as sexually explicit because it contained the word "breast".)

55. Tagging URLs. Note that domain names, directory names and file names are all part of the URL which identifies the file to be retrieved. This same information is used in the World Wide Web, Gopher and FTP. All of these forms of tagging in essence will place the string "-L18" (or some other standard string) somewhere in a URL. Recognizing the tag is a simple matter of looking for "-L18" anywhere in a URL to know that the referenced material is inappropriate for minors. Note that creating such a tag requires no change to any current Internet software.

56. For the purpose of this declaration, I assume that the vast majority of Internet content is not within the scope of the Communications Decency Act (CDA), and thus would be completely unchanged by this proposal. The contents of the files, be they images, movies, animations or executable programs, are also unchanged by this approach, thus requiring

no change to existing standards and no new software development.

57. The L18 scheme described here and the PICS model clearly tag any URL regardless of how a user reached that document. There are no "back doors" by which materials would be untagged, other than by failure to "tag" that portion of a provider's material. These forms of tagging address concerns expressed over the blocking not only of "home pages," but also to materials reachable from such home pages.

58. *Tagging portions of HTML files.* In some cases it may be useful to tag only a portion of a file as sexually explicit. For example, a content provider on the World Wide Web may have a portion of a file which the provider may believe should be excluded from minors. The Hyper Text Markup Language (HTML) provides a syntax for embedding tags in text. Take for example the text "I want to go home". The tag indicates that bolding is to be turned on and indicates that it is to be turned off. The result is that most HTML display routines will display the word "home" in bold face type. The HTML standard could be extended (without impacting any existing HTML) to include the <L18> tag. For example, the string <L18>random dirty words</L18> is now tagged as sexually explicit and it would be possible for web browsers not to display the text if a minor is using the browser.

59. For a portion of a file so tagged, the material could be surrounded with the L18 tag and thus clearly identify that section as not suitable for minors. Note that this would require a modest amount of additional programming in the browser client software to recognize the tags. Embedding the tags on the part of content authors would not require any new technol-

ogy development. The effort required for an Internet author to tag some section of a document as sexually explicit is no larger than the effort required to put the same section in bold face type.

60. *Tagging e-mail messages.* Every e-mail message automatically contains the user name and the domain name from which the e-mail originated. If the domain name of the site sending the mail contains the string "-L18" (for example "cyberporn-L18.com") then all mail messages from that site are tagged as sexually explicit. This technique could be used for e-mail "sex talk" sites.

61. Suppose for example a company identified as "Adult.com" provides a variety of online services of a sexually explicit nature. One of those services might be explicit e-mail on sex. The company's staff could be given the user name "sex-L18". Thus all of their e-mail would contain "From: sex-L18@Adult.com". The messages are all clearly tagged as not suitable for minors.

62. The hypothetical company identified as "Adult.com" may, however, determine their messages are generally appropriate for minors and only on occasion are their messages graphic enough to require screening. Every e-mail message can contain a textual subject line. If their staff believes that an explicit adult message is necessary, they can include "-L18" in the subject line to mark clearly that particular message as inappropriate. There is no new technology required for the tagging of e-mail messages. The effort required to tag a specific e-mail message as not suitable for minors is four (4) key strokes.

63. *Tagging mailing lists.* Some groups maintain e-mail lists for which membership is either manually

created or in which users can join or leave on their own. For specific messages sent to such lists the tagging techniques described above could be used. On the other hand, the list "dirty-talk-L18@all. adults. com" could be created. Any message sent to this list would be forwarded to the e-mail in box of all members of the list. When it arrived in that in box, all such messages would be clearly tagged with "-L18."

64. *Tagging newsgroups.* News group names can be tagged. Any news group or collection of new groups can add "-L18" to their name to show that minors are excluded.

65. *Tagging news group postings.* Sexually explicit messages could still be posted to any new group using "-L18" in the subject line.

66. *Tagging chat rooms.* Every Internet chat room has a name. Chat rooms for sexually explicit conversations can be named with "-L18" in the name and everyone is clearly warned.

67. *Other tagging schemes.* There are other ways in which content authors can tag their materials. The "-L18" scheme described above is simply a demonstration that such tagging is possible without damaging the fabric (or "flow") of the Internet, as Prof. Hoffman has claimed. *See* Hearing Tr. 14:14—15:12 (Mar. 22, 1996).[1]

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[1] Other more comprehensive schemes such as PICS would work as well, provided that authors, not screening services or parents, are legally responsible for sexually explicit material. The serious technical problems that arise when trying to block indecent material without the cooperation of the authors will be discussed in a later section of this declaration.

D. *Tagging Effort*

68. Mr. Bradner has stated that the effort required to put tags onto existing Internet materials is too time consuming to accomplish. *See, e.g.*, Hearing Tr. 63:9-14 (Mar. 21, 1996). It is claimed that the burden of such tags is too great a load for content providers to bear. My premise here, however, is that the vast majority of Internet material requires no such tagging effort.

69. *Newly created Internet materials.* I agree with Mr. Bradner that for content providers creating new materials the tagging scheme described above is trivial. *See* Hearing Tr. 155:17—156:19; 163:10-12 (Mar. 22, 1996). However, content providers who do not choose to add "-L18" to file names could still post them in a labelled "adults-only" area.

70. *Tagging materials on the WWW.* Tagging of files is already required on the WWW. When an HTTP server retrieves a file to fulfill a request from some client, that server must give the file a type identifier so that the client knows what kind of data is being received and what format that data is in. It is computationally expensive to require client software to figure out from the content whether a file is hypertext, a GIF image, and MPEG movie for some other piece of data.

71. Unfortunately most HTTP servers do not know what the file contents are either. HTTP servers figure out the type of the data by looking for special tags, call extensions, which are embedded in the name. It knows that "Help.html" is an HTML file because its extension is "html." It knows "Mountains.gif" is an image encoded in GIF format because of the "gif" extension. Without such tags encoded in

file names, the World Wide Web would not work. Tagging by the authors is required.

72. The above scheme for tagging Internet materials is not the only scheme that could be used. It was presented as a scheme which would require no new technology to be developed. The PICS architecture which is supported by a wide variety of industry groups could also be used by authors to tag their materials.

73. In PICS a request on a server from a client can include a request for the rating of the material to be returned. A rating system called "CDA-compliance" (or some other name) could be created within the PICS architecture. Internet content providers could include such rating information directly in their HTML documents or using a special database. Using either approach PICS presents a widely supported developing technology which would allow content providers to accept responsibility for preventing access by minors to their sexually explicit materials.

74. *Tagging for libraries.* There are two issues involved in tagging library material, namely (a) the use of sexually explicit terms in library catalogs, and (b) the content of actual online books. With respect to catalog material, finding all books with sexually explicit words in their titles through an automated word search would not be difficult.

75. With regards to online content, the effort required to place any given item on the Internet is quite large compared with the effort required to tag such an item. The classification and cataloging of books is one of the major things that libraries do. Every book that enters a library must be catalogued, indexed and stored. The important point is whether tagging an

assumed small number of sexually explicit online library materials imposes significant additional costs.

76. Some libraries currently use the Library of Congress catalog number as a prescreen for materials that should be placed in locked cases. For example, the LC number RC560.S23 indicates masochistic sex which may highlight materials that librarians should check for their suitability for minors. The Library of Congress catalog number could be used similarly to aid in classifying online materials. In addition, organizations which provide cataloging service sharing among libraries (*e.g.*, Research Libraries Group or OCLC), could also help. The purpose of such services is for libraries to share cataloging chores with each other. Since such mechanisms for classifying already exist, and there is no reason to believe that such mechanisms cannot handle the tagging of sexually explicit materials.

E. *How to Use Tags to Block Sexually Explicit Materials*

77. Having shown that there are a variety of ways in which Internet material can be identified as sexually explicit, and that tagging is inherent in the way that the World Wide Web already works, this section will show how such tags can be used to prevent minors from accessing such material. There are three major models presented here. This is not intended to be a complete list of possibilities, but rather only a set of examples of how blocking can be accomplished.

78. These examples of blocking technology form a continuum of levels of provider responsibility. In the first model, a provider's server software is configured

to serve sexually explicit material only to requesters known to be adults. In the second model, a provider only accepts requests for adult materials from sites which are trusted proxies. These proxies make such requests on behalf of users which the proxies certify are adults. In this technique the provider has delegated the adult verification inquiry to these trusted proxies. The final form of screening is where the provider assumes that the client software is blocking sexually explicit material if the user is a minor. None of these approaches relieve the provider of the responsibility to identify sexually explicit material. The only responsibility that has been delegated is the verification of the user's age.

79. *Self verification approach.* The most secure approach is for the server software of the content provider to refuse to serve material tagged as sexually explicit to any requester that is not known by the server to be an adult. The server software can identify sexually explicit material as any URL with "-L18" (or some other standard tag). This approach requires that the server must be capable of determining if the requester is an adult.

80. *Account/Password verification of adults.* One approach for verifying adults is to provide users with accounts and passwords on the server machine. If the provider verifies that the user is an adult and issues a password to that user, then server software can be configured to verify the user before offering service.

81. All FTP servers require user names and passwords before serving files. In fact, only the informal convention of using "anonymous" as the user name allows unknown users to get access to files or directories via FTP. The user account mechanisms on most machines will restrict users to particular

directories and prevent unauthorized retrieval of files. Such mechanisms could restrict access to adult-only material without interfering with the use of anonymous FTP for all other materials. There is no new technology required to accomplish this.

82. Many HTTP servers can restrict access to particular files and directories. In particular, the Netscape HTTP server explicitly provides for blocking of all URLs which match a particular pattern unless the user has been verified by name and password. Files and directories whose names match the pattern "*-L18*" can be identified by the server and only served upon receiving a proper name and password. *Cf.* Declaration of Scott O. Bradner ("Bradner Decl.") ¶ 79 (no current Internet technology is "configurable to block material with such tags").

83. If a site wants to require user name/password access to adult materials, there is no new technology required. Operating systems have long provided for and/or required user logins.

84. *Hash codes to replace user database maintenance.* If providers do not want to maintain a database of users, a hash code technique can be used. Suppose that the server provides a web page where users can apply for adult access. Users can enter their name and credit card number. This information can be used to compute a pseudo-random number (*i.e.*, the "hash code"), from the user's name and convert that number into an 8 character password. In the future the user enters their name and password. The hash code is recomputed from the name and compared against the password. If there is a match, then the user is known (within a reasonable doubt) to be the same person who earlier registered as an adult.

85. The key point of this discussion is that it is possible to register users without managing a large database of users. The message digest capability offered publicly in the software library named "RSAREF" would fulfill this purpose exactly. *See* http://www.rsa.com.

86. The CGI (Common Gateway Interface) code required to generate and check the passwords using the hash code technique would take less than a week to write and install on almost any HTTP server. The total cost should be less than $5,000 if the code was written from scratch. This cost would possibly be higher if the very secure RSA approach was used. This could be alleviated, however, if RSA made such CGI code available in the same way that they do with their RSAREF code. Given the nature of the Internet, such code would soon be posted for free and providers would not need to write any new code.

87. *Web service providers can provide blocking services.* Individuals who only want to publish content and do not want to manage an HTTP server must currently pay for some commercial entity to do their web service for them. Given the nature of the Internet marketplace, services which provide "adult verification" for material marked as sexually explicit would soon be expected to proliferate. Such server-level blocking of tagged materials would become no more complicated than any other web-service operations.

88. *Determining which applicants are really adults.* Before assigning a user name and password, a service must determine whether the applicant is really an adult. The law provides for credit cards as a means of verification. Services such as IC Verify ("www.mktmkt.com/ic.htm") advertise a computer

based mechanism for processing credit cards in less than 30 seconds. Processing a charge of $1 through this mechanism would verify whether the applicant is an adult. There is already a developing SEPP (Secure Electronic Payment Protocol) for MasterCard and Visa which will provide such services over the Internet ("http://www.mastercard.com/Sepp/sepptoc.htm"). Such charges for verification need only be performed once when a user applies for access. After that a user can provide the name and password issued at registration time for their access.

89. For information providers who do not want to develop their own adult verification service, they can post their information with a service that does provide such verification. An alternative is use of a validation service such as Validate ("http: //www.zynet.com/-validate"), Adult Check ("http: //www. adultcheck.com"), Adult Verification System ("http: //www.LANDSLIDE.Com/houdini/Adult_Access.html") or Verisign ("http://www.verisign.com"). Instead of adult verification being a cost for an information provider, some of these verification services offer "bounties" of $2.50 to $3.00 for each provider that refers a new registrant to the verification service.

90. *Internet commerce.* To assert that it is technologically too hard for an information provider to determine personal or credit card information is to say that shopping over the Internet is too difficult. In order for anyone to sell anything to anyone over the Internet, the seller must determine who the buyer is so that payment can be received. This basic functionality for commerce already exists on the Internet and will only improve in cost, speed, reliability and simplicity. Even if an information supplier does not

want to charge for access, it does not seem unreasonable to charge a very small amount for initial registration. Digital signature or certificate technology is already being developed for Internet commerce purposes which could clearly identify adults for purpose of screening materials.

F. *Trusted Proxy Approach*

91. A second possible approach to preventing marked Internet materials from reaching minors is to accept requests from trusted proxy servers. To understand this approach, we must first define what a proxy server is. Secondly, I will show how proxies and providers can cooperate so as to give assurance to the provider that minors will not receive material designated for adults.

92. *Proxy servers.* When client software, such as a WWW browser or an FTP client, interactively receives a request from a user, the client software will make contact with the provider's server and request information. It is not always desirable for client software to negotiate its own Internet contacts. In many cases organizations do not want individual users to make direct contact with servers.

93. The most notable examples of where organizations do not want direct Internet contact are in corporations. In such cases, the corporation wants to control the information that individual employees can send out of the company (to protect secrets) and the information coming in (to protect liability and system security). If the client software of each employee can make its own contact with the outside world, there is little control of information possible. One alternative is to separate the company network from the Inter-

net. This cuts off the company from a major informational medium, which is probably not a good idea.

94. One approach which allows clients to access the Internet in a controlled way is a proxy server. A proxy server is a piece of software which will make requests on behalf of a client rather than allowing the client to make direct contact. This is similar to a company requiring that all contract negotiations go through the company attorney. Employees who want to execute a contract with some outside party make their request to the attorney, who in turn negotiates the request with the outside party. The reason for having the attorney serve as the proxy is to ensure that all legal requirements are met and legal exposure is avoided. This is very similar to the purpose of a proxy server.

95. When using a proxy server, client software does not contact any server software other than the proxy. The proxy checks the request against some approval criteria for acceptability and then, if appropriate, makes contact with the actual server and forwards the request. The server sends the request back to the proxy who then responds to the original client.

96. Let us suppose that there was an Internet service provider that allowed users to log in over phone lines or some other communication medium. Let us also suppose that such a provider went to the small additional effort of tagging each user account as minor or adult. Such a provider now has electronic knowledge as to the adult status of any user logging into its service. It is possible for the provider to share this knowledge with content providers.

97. Many such providers do not give their users direct access to the Internet. What they give them is

a proxy server. We now have all requests from users of this service going through the service provider's proxy which knows whether the client is an adult or a minor. Such a provider could thus verify the adult status of the request as a service to the content providers.

98. *Proxy - provider communications.* A server could take all steps described in the previous section to verify adult status on its own. In addition, if America Online, CompuServe and Microsoft Network all advertised that they would not create requests on behalf of users who are minors which contained the string "-L18" (or any other standard string) in the URL, they would become trusted proxies in the sense that the content provider can treat the service provider's proxy software as an adult. This would mean to the content provider that a huge number of potential users do not need to be verified.

99. *Who are the trusted proxies?* A remaining problem with this approach is that a content provider's software needs to know which requests come from trusted proxies. One approach is to register each proxy as an adult user in the same way that the server would register an individual user. This is an improvement because there are far fewer proxies than there are users. Since proxies are relatively few in comparison to users, they could register themselves with various registration services and thus reduce the burden on the content provider of identifying or tracking such trusted proxies. Any proxy which registered would be warranting that they are doing adult screening.

100. *Remaining implementation issues.* The question still remains as to the effort required to implement such trusted proxies. In our lab we down-

loaded the Netscape proxy server, installed it and configured it to block URLs containing "-L18". This is standard software, readily available and widely used. The entire process, including obtaining the software from Netscape, took less than four hours. This would be all it would take for Netscape (and, by extrapolation, Microsoft as well as other major "players" in the server software marketplace) to protect children from sexually explicit material. Note again that material not tagged as sexually explicit is not hindered in any way by this approach. Examination of the access records of our own HTTP servers indicates that all requests from America Online and similar services come from the same IP address. This indicates that services such as America Online are already using some form of proxy server to connect their users to the Internet. *Cf.* Bradner Declaration, ¶ 79 (no currently available Internet technology is "configurable to block material with such tags").

101. A variant of the proxy server concept is the notion of an e-mail server. User software for processing e-mail rarely engages directly in the sending and receiving of e-mail. The reason is that users and their machines are frequently unavailable when it is time to receive mail or the Internet resources to send the mail may not be available at a particular time. Client e-mail software will typically contact an e-mail server to receive saved mail and to send new mail.

102. Such server software knows the account of the user that it is receiving mail for. The software therefore could differentiate between minors and adults. I do not know of any mail server that currently does this, but I do not believe that such code is complicated to write. If the e-mail server knows that

the user is a minor it could reject and return any e-mail message that contains "-L18" in the sender or subject line information.

G. *Client-Side Filtering Software*

103. Another possible means of limited access is client software which has been configured for minors. Such software would refuse to request or display any information marked with a string such as "-L18" in the name, source or subject line of the material. By refusing to request such materials minors are protected from those materials ever reaching the home computer. Such materials would never even appear in the home computer's browser cache.

104. *Availability of such clients.* There are relatively few vendors of Internet client software as compared with the number of proxies or the number of users. In fact, Netscape alone claims 80% of the WWW browser market. As has been discussed earlier, there are market forces to encourage client software vendors to produce "kid safe" versions of their software. If Netscape alone would do this (and if their marketing information is true), 80% of all WWW clients would be safe. If even the top five vendors joined up, the coverage would be quite thorough.

105. *Implementation of such filters.* The code required to check a URL for the string "-L18" would take less than 1000 lines or about one week's work per browser implementation. Many mail clients such as Eudora, mh, ProcMail, Information Lens and GroupWise already allow users themselves to create such filters. The only additional work in such systems is to hard code the filter so that enterprising minors cannot undo it. In our lab we were able to configure

Eudora in about 10 minutes to screen "-L18" messages. It took a similar amount of time for us configure the Netscape client to screen material tagged by our server with the string "-L18". The programming for such client side screening is very simple.

106. *Public access information providers such as libraries.* Some institutions, such as libraries, may want to provide Internet access to the public at large. Such institutions must deal with patrons of all ages. There are two approaches to this problem. The first is to segregate the "adult only" access terminals from the general terminals. Workstations in the adult only area would be configured with non-screening client software while the generally open workstations were configured with the "minor access" blocking software.

107. An alternative is for the library's client software to verify the age of the person using the workstation. Almost every library requires a patron to have a library card with a number on it. It is the basic mechanism used to check out books. Every free library that I have had contact with differentiates between minor and adults. When a minor wants a library card, an adult must sign for them and accept responsibility for lost or damaged materials. The library even tracks this additional information. Before a library takes on the task of providing Internet access to patrons they will first have gone to a computerized patron information system for checking out books. Requiring a patron to enter their library card number before accessing adult tagged Internet materials is an easy way to screen for minors.

108. *Summary of tag blocking.* It has been shown that technology already exists for Internet content providers to register adult users and block access to

adult material when requested by non-registered users. It has been shown that providers can already get registration services on the Internet and be paid for referring customers to the registration service. It has also been shown that content providers can do such verification without managing a database of users. It has also been shown that such providers can post their materials on such sites which will perform such adult verification for them. All of this technology is available, off the shelf, today.

109. The notion of trusted proxy servers has been presented. A proxy server can represent a large body of users and can certify that any requests by minors for materials tagged with sexual explicitness identifiers will have already been blocked. Content providers can treat such trusted proxies as adults. The technology for this approach is available today. Cooperation from Internet providers that know who their users are, would have to be negotiated before this approach becomes widely available.

110. It has been shown how client software is easily modified to block sexually explicit material. My experiments have shown that this approach requires minimal modification to available client software. Such software would, however, need to be modified before this approach can be deployed.

111. Lastly, although the L18 scheme has been presented as a simple solution, the "self rating" portion of the PICS content rating proposal could also be used in a similar way for similar purposes. There is some difficulty with PICS, however, with blocking particular email or USENET news messages.

III. THE UTILITY OF BLOCKING WHEN RELYING SOLELY ON THE USE OF THIRD PARTY SCREENING DEVICES

112. The next issue I will discuss is whether parental supervision, augmented by third party blocking software and/or rating or screening services, will in fact restrict minors' access to sexually explicit materials.

A. *Site Screening Ineffectiveness*

113. Sole reliance on such third party ratings is futile in achieving the goal of protecting minors from sexually explicit materials. Unlike movies and video games, where at most a few hundred come on the market in any given year, Internet sites proliferate at a much greater pace. It is feasible for a small group to experience and rate all of the movies and all of the video games that enter through normal retail market channels in a year. Even television, which produces much more material than either of these two media, produces only a limited amount of material per week.

114. As Mr. Bradner has testified, the number of sites on the Internet is doubling every 9 months. *See* Hearing Tr. 22:3, 22:13 (Mar. 21, 1996). This means that a screening service such as Surfwatch must look at as many new sites in a 9 month period as have ever existed before in the history of the Internet. This is a formidable task. Even this task assumes that the sites which were previously inoffensive will not start posting patently offensive material after they have been examined by the screening agency. The PICS proposal for third party "label bureaus" is based on tagging individual documents via URLs. This means

that a label bureau would need to tag and log every document on the Internet. The impossibility of this task has led to modifying PICS so whole sites or directions can be tagged at once.

115. Third party screening agencies impose additional costs on Internet users. If a parent wants to connect their home computer to the Internet they can obtain a connection for roughly $20 per month. If in addition, they want SurfWatch to keep sexually explicit material out of their home, it will cost an additional $5.95 per month. This means that 22% of their Internet connection costs are for children's protection. This approach shifts the costs of protecting children from sexually explicit online content from the speakers to parents or guardians. This means that parents and guardians must bear some of the costs for speech that they didn't want in the first place, or forfeit their children's safe access to the Internet.

B. *Screening Technology*

116. Current screening technology takes two forms. The first is IP address blocking in which the addresses of certain sites are saved and all transactions with those sites are automatically refused. The second approach is screening for particular words. Current blocking services use one or both of these approaches. A third approach, which is proposed in PICS, is that individual URLs would be verified with the provider or a label bureau to determine their appropriateness.

117. *IP address blocking problems*. IP address blocking requires that the user's computer have stored on its hard disk a list of all IP addresses which should be

blocked. When one subscribes to a screening service for $5.95 per month one is receiving every month an updated list of sites to block. If the number of blocked sites grows at a similar rate as the Internet, the space required of each user to save the sites will quickly become problematic. This means that user computers must allocate an increasing amount of space for "child protection" information.

118. Even if the screening service can keep up with the content, the requirement that every user receive and store all of the blocked sites becomes prohibitive. The net effect of this approach is that the existence of a sexually explicit item on the Internet requires that every parent allocate computing storage resources to the task of blocking that item. Instead of providers assuming the one time cost of identifying their sexually explicit materials, that cost is multiplied by every home computer in the U.S. that is connected to the Internet. Even if a sexually explicit site were to register with such a screening service, there would in all likelihood a one month delay before screening takes effect.

119. *Additional screening problems for sexually explicit materials.* The second screening technology is to detect the presence of sexually explicit materials as they are received in the home computer and then refusing to present those items. Such a task for movies and images is impossible in current technology. There is no technology in the foreseeable future which would be capable of identifying a sexually explicit image. Such a task for audio items is very difficult and not completely effective. For these types of information no automatic content screening is possible at this time. It is possible, however, to search textual materials for particular words or

strings of words. Of course, to the extent that descriptions of explicit sexual or excretory activities or organs are described without the use of particular "search terms" used in particular third party screening software, such screening efforts as are made will be ineffective.

120. Even if screening for particular words were effective in detecting sexually explicit materials, it is frequently not done on every piece of information received. Experiments with SurfWatch show that such screens only detect particular known words in the URL, not in the body of an HTML document. If the URL does not contain these words, then the material is passed on to the child regardless of what may appear in the body of the text.

C. *Problems with Label Bureaus*

121. The proposed PICS system has two primary implementation approaches. The first for the content server to provide the ratings when the client requests the information. This is consistent with the provider tagging schemes advocated earlier in this declaration. The second approach is for client software to contact a "label bureau" with a URL before actually requesting the URL from the content provider.

122. The first problem with this approach is that every URL now involves two Internet requests rather than one. The first is to the label bureau and the second to get the actual content. There are already complaints about the slowness of the Internet interfering with the "flow" of its use. In many cases the speed problem is not in the size of the message (bandwidth) but rather in the total time for a message

to make a round trip from the client to the server and back again (latency). This requirement of access to the label bureau on every URL would double this latency in many cases. The PICS documents already point out that such label bureaus could become a serious bottleneck. *See* http://www.w3.org/pub/WWW/PICS/labels-960323.html (Appendix A). Note this third party scheme imposes costs, not just on sexually explicit materials, but on all URL communications.

123. The second problem has to do with the huge amount of Internet material. For a label bureau to meet its advertised level of effectiveness it must have a table entry for every unique URL on the Internet. This is already a huge amount of material and growing exponentially. The PICS standard does, however, have some mechanism for clumping large amounts of material together under a single rating which will have the net result of reducing most label bureaus to simple site screening.

124. The third problem with label bureaus is that they cannot label ephemeral materials such as e-mail messages broadcast to mailing lists or message posted to news groups. Such materials have a very short life time and are generated and die with a rapidity that is impossible to track in a database of URLs. If a person generating a sexually explicit message is not obligated to label it as so, such label bureaus have no alternative to offer.

125. The fourth problem with label bureaus which are unassisted by content providers is the assumption to be made when a bureau has no rating for a particular URL. Given the size of the problem of tracking URLs and even sites, we must assume that a particular label bureau will have rated only a small fraction

of the material on the Internet. If we assume that unknown URLs are decent and we also assume that there is no legal obligation for providers of sexually explicit material to make sure that they have been rated, then there is in essence no protection for minors. The unrated material is thus unscreened by anyone.

126. If we assume that any unknown URL is sexually explicit, then minors are shut out from most of the Internet. This assumption is equivalent to a site inclusion list as defined in the parties' Joint Stipulation, at ¶ 53.

D. *Summary of Third Party Screening*

127. In summary, identifying sexually explicit material is a human judgment that is not fully automatable using any known technology. The process of evaluating sites and producing lists of inappropriate sites is a huge task that is already ineffective in its current efforts and will become increasingly more difficult as the Internet grows. The only economically viable mechanism for evaluating Internet content is for content providers to assume the responsibility. Technologically, if the number of inappropriate sites continues to escalate the burden on users to store lists of blocked sites can become large. There is no known mechanism for automatically screening Internet content. Any existing screening technology is too slow for existing home computers. The only effective means for classifying Internet content is if the creators assume responsibility for that classification, either by doing it themselves or by affirmatively taking steps to request that third parties classify the

material. This is only solution which can grow at the same rate as Internet content is growing.

IV. YOU CAN BE SURPRISED ON THE INTERNET

128. Most current users who access the Internet are using a WWW browser. Requesting information consists of clicking on hyperlinks or typing in search strings. If the description of a hyperlink is not informative, a user may get what he or she did not expect. If the identification is not clear then the user can encounter items that they do not want to. *Cf.* Declaration of Donna L. Hoffman, ¶ 66.

129. Searches are not precise in what they retrieve. It is very difficult to use the Internet without a search engine. It is therefore very easy to get materials that one does not expect. This problem is exacerbated by content providers manipulating search engines to highlight their sites.

130. Even if information serving applications require a user to take specific action to retrieve materials, e-mail and newsgroups do not. Almost anyone on the Internet can send an e-mail to almost anyone else. The receiver does not control what appears in their in-box.

V. SUMMARY

131. *Standards and government.* The heart of the Internet is standards for communication. The setting of such standards for a variety of purposes is integral to the concept of the Internet. The Internet is not technological anarchy. Some of its content may have been anarchic before CDA but the technology is not.

The government is also not a new player in the Internet.

132. *Technically infeasible to screen without author assistance.* Because of the growth of the Internet it is, as a practical matter, impossible to screen all of the sites that might produce sexually explicit material. There is simply too much material generated in a given day for some organization to screen for sexual explicitness. It is also impossible to automatically screen visual material for sexual explicitness—this requires human judgment. Any automatic screen of textual materials must be trivial if applied at the client's site with any degree of efficiency.

133. If creators of sexually explicit content are required to tag their materials as such, then they bear the minimal cost of such screening. If such content creators do not tag their materials, then parents and other end-users must bear the costs of filtering what they do not want. That is, end users would be required to bear such costs in terms of computing resources and/or fees paid to ratings services.

134. *Tagging is technically possible without change to the Internet.* Everything on the Internet has a name. Simple tags can be placed in those names which provide an almost limitless number of ways to classify sexually explicit material. The necessary tagging requires no new technology and can be implemented today. The only thing that is required is agreement on a string (such as "-L18") which can be used as the tag. Only the material which is sexually explicit under the law needs to be tagged. All other Internet communication is not affected in any way.

135. *Blocking is possible without change to the Internet.* There are a range of ways in which content

providers can keep their sexually explicit materials away from minors. The first is to verify, via credit card or other verification schemes that requesters are adults. It has been shown that this need only be a one time charge, and, from then on, adult users can be verified without maintaining a database of users. It has also been shown that third party adult verification services already exist in the marketplace. In addition, those wishing to publish adult-only material can have those who manage their web site take care of the adult verification inquiry without any effort on the part of the "publisher."

136. It was also shown how service providers could offer trusted proxy servers which would promise to forward only requests for adult materials if the user was known to be an adult. The providers of such services would already know who their users are because that is how they bill for their services.

137. Lastly it was shown that client software can be easily modified to screen out material clearly labeled as sexually explicit.

138. A most important final point is that the Internet and the community that surrounds it have tackled far more difficult problems than keeping sexually explicit materials from minors. The whole area of Internet commerce and the protection of electronic "money" is a far more difficult challenge. Thus, there is no reason to assume that the Internet community cannot incorporate technological methods of the type described in this declaration. Moreover, the implementation of such methods by the Internet community would, in my view, neither damage nor affect in any adverse way this national resource.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 9th day of April, 1996.

/s/ DAN R. OLSEN, JR.
DAN R. OLSEN, JR.

SCHMIDT EXHIBIT 6

Adult Check http://www.adultcheck.com/

Adult Check ©

Adult Check© is the Internet's premier adult verification process. Adult Check was designed to help keep the Internet's Free Communication between Adults. Verified by top First Ammendmant [*sic*] Attorneys and created by Internet and Communication Specialists, Adult Check is the Internet's response to Government Censorship. Sites using Adult Check are able to restrict minors from entering. It is very easy to use for Net users, simply fill out the *form*, including your Credit Card Information, we charge a nominal $9.95 annual fee, and we will give you an Adult Check ID which you can use at all participating sites. This means that anytime you want to enter a site utilizing Adult Check, you simply enter your Adult Check ID# and it will let you enter, for FREE! All information you give us is held strictly confidential and is not distributed. With an Adult Check ID, you can once again cruise the Net and communicate the way **you** choose.

Apply Information E-Mail

Facts:

- **Adult Check is running on a Netscape Secure Commerce Server.**
- **All information given to us is encrypted and NOT redistributed!**
- **Your privacy is of upmost importance to us!**
- **Once you fill out the form below, you will be given your Adult Check ID.**
- **You may use your Adult Check ID to enter all participating sites, for FREE!**
- **The membership fee is $9.95 per year.**
- **The list of participating sites is growing rapidly!**

*****Apply Here*****

If you have a browser that supports secure communications, click **here**.

If you have a browser that does NOT support secure communications, click **here**

If you own an Adult Site and would like information on Participation click **here**.

Links Information E-Mail

[Links].....[Information].....[E-mail]

More Information: http://www.adultcheck.com
/info.htm1

More Information

Adult Check is a verification system that assigns Adults an Identification Number, which allows you to enter many adult Web Sites and See what only Adults are allowed to see. Under the current law it is a Federal Crime to transmit "obscene" material over the Internet unless you take steps to prevent minors from entering. A verified credit card is proof enough that an individual is an Adult and can have access to "Adult Material".

Whenever you go to an Adult Site that utilizes Adult Check, you enter your Adult Check ID and it will verify it within our database. If it is a current ID number it will automatically put you into the site, if not it will give you a denial page. This whole process is performed on a secure server, so your information is safe!

In order to obtain an Adult Check ID, fill out the form on the **Home Page**, which is also a secure page using Netscape Secure Commerce Software, and we will process your information and give you your ID#. Be sure to enter your full e-mail adress, so we may be able to communicate with you. We will bill your credit card $9.95 for the ID number, and that is good for 1 year.

We are currently expanding the number of Adult Sites using our system, it is growing rapidly, so get one now to be able to see the sights YOU want to see! This is the Internet's response to Govern-

ment Censorship! Thanks for your participation and be sure to tell others about our service.

If you own an Adult Site and would like information on Participation click **here.**

Apply Links E-mail

[Apply]....[Links].....[Information].....[E-mail]

* * * * *

Merchant Information http://www.adultcheck.com
/merchant.htm1

Adult Site Owners!

Adult Site Owners,

Adult Check© is a verification system that allows you to screen out minors from entering your site, and a great way for you to earn some money off of the volume of your site. Protect your Site, your Self, and make money using Adult Check.

If you are in violation of the Communication Decency Act (CDA), which states that it is a Federal Crime to transmit 'obscene' material over the Internet, without taking appropriate steps to prevent minors from accessing it, you may face fines of up to $250,000 and/or 2 years in prison. We feel this is a direct violation of our Free Speech; however we have found a way to continue free speech over the Net.

Adult Check was designed by First Ammendmant [*sic*] Attorneys, and Computer/Internet Experts. Under the current law, a 'verified credit card' is proof enough that one is an Adult and protects you from the law. Adult Check verifies the credit cards of its members and issues them an ID#

which they may use to enter your site and view 'Adult Material'.

When a person applies for an account with us, they are asked which site referred them. For each customer your site refers us, we pay you $3.00. At the end of every month we tally up how many customers each site has sent us and we send a check out. If your site refers us 1000 clients in one month, we send you a check for $3000.00. This is a great way for you to generate income off of your site as well as protecting yourself from the law.

Installing the Adult Check System is extremely easy, all you have to do is **E-mail** (or fill out the form below) us the address (full URL) of the page where you want people to enter their Adult Check ID's, and the URL of the page you want people to get when they enter a valid ID#. So in other words the URL of the warning page, and the URL of the content page. Also be sure to include the name of your site, so we may put you on our **link page**, and the name we should make the check out to, along with your full mailing address.

What benefit does this give you?

- ☐ If you have 'obscene' material on your page, it will protect you from the law.
- ☐ If you have censored your material, you probably have seen a drop in traffic-now you can uncensor the pictures and see your traffic rise again.
- ☐ You may use this to protect your whole site or just a section of your site.

- ☐ You are preventing minors from entering your pages, which may let you sleep better at night.
- ☐ You will be placed on our very popular **Links Page**, which will increase your traffic.
- ☐ We will also send you an Adult Check ID, for free.
- ☐ Generate substantial income off of your site.
  In order to start the process of utilizing our system on your Site, simply fill out the form below.

Once we recieve this, we will update our database with your info and send you a very simple HTML code to include on your Warning Page. It is about 4 lines and very simple to install. There is no CGI or any other programming besides the HTML code to include. We take care of the rest.

Once anyone hits your site they are prompted to enter their Adult Check ID. Once they do, our CGI Script and Database will be accessed and the ID number will be verified, if it is correct, it will return your Content Page and they are in. If the ID number is invalid it will give them a Denial Page and a way to apply for an account.

The **application form** is running on a Netscape secured server, and all transactions are secure. We have an extremely quick database, server, and multiple T-1 connections to the Net. This makes the process very quick and easy. Thanks for your interest and we look forward to having you utilize our Sytem.

* * * * *

SCHMIDT EXHIBIT 8

INFORMATION FOR WEBMASTERS AND VALIDATE
http://www.donsworld.com/webmas.html

Validate

WHY SHOULD YOUR SITE BE PART OF THE VALIDATE NETWORK

1) The response from those signing up has been better than we could ever have imagined. People love the idea of not being stuck paying for one site and taking the chance of not being happy with that site.

2) Many of the other similar services will sell your guest lists for profit. Validate WILL NOT sell any list to anyone.

3) Validate handles all transactions leaving you free to take care of your site. They will supply you with accounting info every 30 days or less so that you can keep track of how your site is doing. For payments made to them from First Virtual accounts you will be paid after approx. 90 days, and on payments made to them by check or money order you will be paid once a month or sooner.

4) You will have access to the Web-Masters Lounge. This is a restricted access only area with chat messaging for web-masters of Validate only. Here you can share ideas, help each other, make new friends, get and share files that you can use for your site, or just hang out and chat with other Web-Masters like yourself.

5) ITS FREE . . . . . Site Owners can setup their Adult Site FREE and its easy to do. Also many of you do not have access to cgi, with Validate that's not a problem. CGI access is not required with Validate. You will get $3.00 from every user that signs up with Validate at your site. Validate only keeps $2.00 and they do everything for you so you don't have to worry about it.

6) Since I signed up with Validate I've had a handful of site owners and users call me chicken. I feel that I would be more chicken if I were not able to put up with their childish remarks. I have to ask myself, What does it matter to them if I do this or not. At least I know that I've done something to help prevent kids from entering my adult site. No system is fool proof, but I doubt there is more than a handful of kids on the net that would actually hit there back button when faced with a simple "If your under 21 please hit your back button now". Are we as responsible Web-Masters really concerned or do we actually want our system to be easy for children to enter? Ask yourself that question! Since I started with Validate two of the Web-Masters that made rude remarks to me about doing this have since vanished from the net like so many of the other sites that vanish daily. Will yours be next also without any warning, and will you be just as smug right up till that moment when you find yourself suddenly without a home. Many Internet Providers are removing adult sites without warning, for not requiring any validation of age, can you assure yourself that yours will not do the same?

7) Many Web-Masters are so caught up with the new law, that they forget people were getting busted before the law was passed. The only thing the law did

was to make it easier. Even if you had a reason not to join Validate, You should do something, because any protection is better than NO protection. The worst protection, is better than no protection, because with no protection you take a chance with not just a few that MIGHT find there way into your site, but with the many that ARE getting into your site.

8) The hits to my page have actually gone up rather than down since adding Validate. And by being apart of Validate you will have many Validated customers coming to your site that otherwise may never have visited your site.

9) I can go on and on and on, as to why you should, but if your not ready to take some responsibility for your site than there is probably nothing else I can say to you.

Here are a few of the comments that I've gotten from my visitors

Thanks Don for using this type of validation. Your site is the first I've ever joined because I've always been afraid I wouldn't get my moneys worth. You can't go wrong with this and so I joined up right away.

$5.00 for a year, and I get access to any system using Validate? That's the best offer I've seen for an adult web site since I first got on the net over 3 years ago.

REGISTER YOUR ADULT SITE FREE

Click Here To Visit [box omitted] The Builder Of This Page

This Page is enhanced for [box omitted] NetScape Navigator

Validate Services http://www.zynet.com/-validate /webmas.html

Validate

WEBSITE SERVICES

Webmasters can feel safe knowing that their websites are not being accessed by minors! This is protection for you! We all need this type of protection!

When you register your website for this service you will be given a "frontpage" that asks for a user ID and password. When this information is entered and submitted by the user, it accesses our database for verification. Once verified, the user will be automatically "transported" to the webpage that you specify! If the user is not 18 years of age or older or has not been verified by our service they will not be able to access your site! There is no need for you to have access to cgi scripts since everything is taken care of for you!

There is NO FEE for this service. As a matter of fact, we pay you to help us implement this service! We will pay you $3 for each person you help us sign up! We will also pay you $1 each year they renew their membership! This could add up to a VERY substantial income for your EVERY YEAR!!!

* * * * *

Validate Services http://www.zynet.com/-validate /webmas.html

Validate

CONSUMER SERVICES

In order to gain access to many websites across the world you just need to verify your age with your credit card. There is a $5.00(US) per year administration fee for this service.

Fill out the online form with a User Name and Password of your choice. You may pay with your Visa or MASTERCARD. You also may choose to send check or money order along with a copy of your drivers license to:

Validate
10905 Towner, NE
Suite D.
Albuquerque, NW 87112

* * * * *

SCHMIDT EXHIBIT 9

FV: Account Applications http://wwa.fv.com/new acct

ACCOUNT APPLICATION

[Clickable Map] [Text Index] [Home Page]

First Virtual Account Application

- ☒ Buying and Selling Summary
- ☒ International Users Guide
- ☒ Terms & Conditions
- ☒ Application for browsers that do not support forms

To Become:

☐ **A Buyer:** you need a valid Visa or MasterCard. (The registration fee is only US$2!)

☐ **A Seller:** you need a bank account that accepts direct deposit via the US ACH system. (The registration fee is only US$10!)

(NOTE: Sellers on **The InfoHaus** need a Buyer's account *and* a Seller's account)

Application Form:

NOTE: This form does NOT ask for credit card or bank account numbers—with First Virtual, you **never** send such information over the Internet! After you fill out this form, you will receive an e-mail message with instructions on Activating Your Account and registering your financial information **entirely off the Internet.**

For Help click on any field name.

Full-Name:

Email-Address:

(check your e-mail address for accuracy! Further application instructions must be sent to you via e-mail.)

Notification-CC:

Phone-Number:

(Include country code. USA / Canada = 1. Example: +1 555 555 5555)

Street-Address:

Street-Address-2:

City:

State:

Postal-Code:

Country:

PIN-Choice:

(Your preliminary account ID choice—8 alpha-numeric characters, minimum)

Address-Redistribution:

(NOTE: Please skip the following choice unless you are completely knowledgeable about MIME and multi-part alternatives, and are positive that your mailer handles them correctly)

MIME-Capable:

FREE TRIAL OFFERS!

As a new First Virtual applicant, you are eligible to receive the following free promotion. Please check the appropriate box:

24 free issues of Newsbytes, the premier computer and telecommunications industry daily newswire service.

No promotions, thank you!

Activating Your Account

For Buying

After you fill out the application form, you will receive an e-mail message containing a 12-digit application number and instructions on how to call our automated, toll-free 800 number. You will then enter your credit card information and application number over the phone.

If you have trouble entering your information (for example, if your telephone cannot generate the proper tones), please send an e-mail message to humanhelp@fv.com (**DO NOT** include your credit care information in your e-mail message!). A First Virtual operator will contact you to get your credit card information by another means.

For Selling

After you fill out the application form, you will receive an e-mail message containing a 12-digit application number and instructions on how to send your bank account information to First Virtual via postal mail. Proceeds of your sales will be de-

posited into this account, automatically, via the US ACH direct-deposit system.

Return to form

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 96-963

AMERICAN CIVIL LIBERTIES UNION, ET AL.

v.

JANET RENO, ATTORNEY GENERAL OF
THE UNITED STATES

Civil Action No. 96-1458

AMERICAN LIBRARY ASSOCIATION, INC., ET AL.

v.

UNITED STATES DEP'T OF JUSTICE, ET AL.

DECLARATION OF ANN W. DUVALL

I, Ann W. Duvall, depose and state as follows:

* * * * *

41. Nearly every press report about parental control software has noted that, although the technology is extremely effective, no single software program that is currently available successfully blocks all access to inappropriate material by all children. To put this in context, however, the currently available software products are *far more effective* than the Communications Decency Act in protecting minors from inappropriate material: the Act would allow much more inappropriate material to reach children than parental control software does. First, at least 30% of the sites blocked by SurfWatch originate

outside the United States, and that percentage is likely to rise significantly if the Act is upheld and producers of sexual material simply move their operations overseas. These sites will be completely unaffected by the Act, but they are very effectively filtered by SurfWatch and other parental control software. Second, because the Act applies to potentially millions of individual speakers, most of whom will not be legally sophisticated and will not have the benefit of legal counsel, many inadvertent violations of the Act will likely occur. The Act, like any regulation, can do nothing to prevent either inadvertent violations or willful violations, because it merely punishes such violations after the material is posted. In contrast, SurfWatch and other parental control software effectively block inappropriate sexual material *before* minors are exposed to it.

* * * * *

DATED: March 19, 1996

March 21, 1996 Hearing

Testimony of Ann Duvall, Vol. I, 161:17 - 162:18

[161]

* * * * *

JUDGE DALZELL: Okay. I got you. And on page 20, paragraph 41, you make the statement that 30 percent of Surfwatch blocked sites, "originate outside the United States." How do you know that?

THE WITNESS: That's from our actual list of sites that we block, so that number may actually be higher than that. But of the known sites where we specifically have the name of the site, it's approximately 30 percent of those that come from outside—

[162]

JUDGE DALZELL: And how are you able to tell that they originate outside the United States?

THE WITNESS: Well, even though today, when I wasn't sure that I came from Paris, many sites actually do have an identifier on them that indicate what country they originated.

JUDGE DALZELL: Okay. So it's based on an actual canvas that you've done—

THE WITNESS: It's an—

JUDGE DALZELL: —of these sites.

THE WITNESS: It's an actual address. We can look at the address, and decide whether it comes from United Kingdom or Finland.

JUDGE DALZELL: Let's assume there's 5,000 blocked sites. You have actually counted, or your firm

has actually counted 1500—to wit, 30 percent as being from outside the United States. Is that correct?

THE WITNESS: That's correct.

JUDGE DALZELL: Okay.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 96-963

AMERICAN CIVIL LIBERTIES UNION, ET AL.

v.

JANET RENO, ATTORNEY GENERAL OF
THE UNITED STATES

Civil Action No. 96-1458

AMERICAN LIBRARY ASSOCIATION, INC., ET AL.

v.

UNITED STATES DEP'T OF JUSTICE, ET AL.

AFFIDAVIT

I, Donna L. Hoffman, of Nashville, Tennessee, declare:

* * * * *

107. The Internet is a truly international communications medium; many dozens of countries are represented by over 128 international hosts and international participation is increasing. Fifty-one country and global domains are experiencing annual growth rates in excess of 100%. The most rapidly growing country and global domains (among those above 10,000 hosts) are Singapore, .net, the Russian Federation, the US domain (.us), Brazil, Finland, Japan, Israel, Italy, Poland, Taiwan, the United Kingdom and Ireland (Rutkowski, Tony, 1996, "Strategic Note - Latest Internet Statistics," General Magic

Strategic Note, February 21. [www. genmagic. com/ internet/]).

108. In absolute terms, the fastest growing Internet domains (a six-month increase of at least 100,000 hosts) are .com, .net, .edu, UK, US, Canada, Japan, Germany, and Australia (Rutkowski, Tony, 1996, "Strategic Note - Latest Internet Statistics," General Magic Strategic Note, February 21. [www. genmagic.com/internet/]).

109. Since July 1995, 28 countries or territories have connected to the Internet for the first time, including Albania, the Bahamas, Bahrain, Cuba, Ethiopia, Guatemala, Jordan, New Caledonia, Sri Lanka, Tonga, and Uganda (Rutkowski, Tony, 1996, "Strategic Note - Latest Internet Statistics," General Magic Strategic Note, February 21. [www. genmagic.com/internet/]).

110. Internet host distribution by country reveals that the top ten hosts (in July 1995) were the United States with over 64%, followed by Germany with 5%, the United Kingdom and Canada with 4%, Australia with 3%, and Japan, the Netherlands, France, Finland, and Sweden each with 2% (Quarterman, John, 1995, Matrix Maps Quarterly, Vol 2 (4), 42-43, Matrix Information and Directory Services, Inc. (MIDS), Austin.). Current estimates put the US/non-US host distribution at closer to 60%/40%, with roughly the same distribution across the top ten countries (Rutkowski, Tony, 1996, "Strategic Note - Latest Internet Statistics," General Magic Strategic Note, February 21. [www.genmagic.com/internet/]).

111. In January 1995, the number of United States networks connected to the Internet (a network is a

communications medium which transports the information - packets - to host computers connected to the Internet) was 26,681 and the number of International networks connected was 19,637 (Internet Society, 1995, [ftp://ftp.isoc.org/isoc/charts/]). This number, now impossible to know, was forecasted to grow to roughly 100,000 networks connected to the Internet in 1996, with approximately half connected in the United States and half connected internationally (Rutkowski, Tony, 1996, "Strategic Note - Latest Internet Statistics," General Magic Strategic Note, February 21. [www.genmagic.com/internet/]).

112. These statistics reveal that the Internet is a vast global medium enjoying explosive rates of growth worldwide.

113. It is just as easy to access a foreign Web site as an American one and no more expensive.

114. There are images of sex, ranging from mild to less mild on foreign sites as well as American sites.

115. Anonymous remailers and pseudonymity servers (computer services that privatize your identity in cyberspace) can be used by Americans or others to post material through an overseas site without disclosing their identity.

116. There is an important distinction between anonymous remailers and pseudonymity servers. When an individual sends a message through an anonymous remailer, no record is kept of the source of the message. Thus, anonymous remailers provide true anonymity. On the other hand, when an individual posts a message through a pseudonymity server, the same pseudonym will always be attached. This allows individuals using such a service to

establish a persistent presence in cyberspace and it allows them to send email, for example, via the pseudonymity server without the receiver knowing the individual's identity.

117. It is also possible for a person, American or otherwise, to set up an pseudonymous account with almost any Internet Service Provider in the world. This means that an individual could establish a set of Web pages from anywhere in the world without revealing his or her identity.

118. Therefore, the Act will not be successful in preventing minors from accessing sexual material via the Internet.

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March 22, 1996, Hearing Testimony

Donna Hoffman, Vol. II, 68:5 - 69:11, 69:22-24

[68]

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THE WITNESS: * * * If we look at a host distribution by country, though, that was in—the latest measurements for that were taken in July of 1995. So, we don't have the figures for Mr. Lottor's most recent calculations, because they haven't been done yet; however, those distributions show that 60 percent of hosts were thought to originate from the United States and 40 percent of those hosts, and in July, '95 the hosts were running a little over six and a half million, now it's almost ten million, so it was about 60-40 U.S., non-U.S., and the distribution—I don't remember exactly, it was United States followed by—

JUDGE DALZELL: And the source you're citing is what?

JUDGE SLOVITER: Lottor.

JUDGE DALZELL: Lottor?

THE WITNESS: Lottor, L-o-t-t-o-r, Mark Lottor, he runs a company called Network Wizards and as a service to the Internet community he runs a program which counts the number of hosts on the computer every six months. I don't—I cannot find my . . . oh, here it is, I found it. My listing is United States had a little over 60 percent, followed by Germany, United Kingdom, Canada, Australia, Japan, the [69] Netherlands, France, Finland and Sweden,

and those are the top ten. Now, the distribution now is thought to be 60-40, even though we don't know yet, but we believe it's moving towards 60-40 and it was at 64-36. So, it's clearly moving toward parody and that seems—is also borne out by counting the number of networks connected to the Internet, which is now moving toward a parody distribution of about 50-50, meaning about 50 percent of networks connected to the net are in the U.S. and about 50 percent of networks connected to the Internet are non-U.S.

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Q Is it fair to say that it takes just as many clicks to go a site in London as it does to go to a site in Philadelphia?

A Yes, or just as few, as the case may be.

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Hearing Testimony, April 12, 1996

Schmidt, Vol. IV, 71:23 - 74:7; 78:10-23; 115:2-22; 131:11-24; 138:23 - 139:21.

[71]

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Q In fact, your knowledge of these mechanisms, these adult identification or screening mechanisms is limited to what you've read on Webpages, isn't it?

[72]

A That is correct, yes.

Q In fact you don't know if so-called adult verification, that's a term that's reflected in some of your exhibits, is different from a system of user ID password or the so-called First Virtual system; you don't know if they're all different or if they're in fact the same thing, do you?

A That's correct, I do not know that.

Q And you have no knowledge of what software is involved with any of these systems, adult verification or First Virtual, correct?

A That's correct, yes.

Q And as to credit card verification, your knowledge of how that works is limited to what you've picked up perusing Web sites, isn't that right?

A That plus experience in previous investigations in bulletin board systems and people requiring credit card access for those.

Q You have no knowledge of the cost that would be involved in instituting a credit card verification system, do you?

A No, I don't.

Q You don't know whether it's possible, whether it's even possible to institute such a system if there's no financial transaction taking place, do you?

A No, I do not.

Q And you don't really know what the First Virtual is, do you?

[73]

A Other than what I've read, no.

Q And what you've read has been limited to the Web site screens that you showed us in your exhibits?

A That's correct, yes.

Q The most in fact that you can say about First Virtual is that you think it appears to be a service that's a sort of verification of authenticity, is that right?

A That's based on reading what's on the screen, yes.

Q And you've never talked with any person involved with any of the adult sites that you've visited that uses an adult verification system to find out how they manage that system, have you?

A No, I did not.

Q And you have no knowledge of whether any adult verification system that you've mentioned in your declaration is usable outside the context of Web sites

or bulletin boards, for example, whether it would be usable for news groups, do you?

A That's correct.

Q You don't know whether any of these adult verification systems would be usable for list exploders, do you?

A No, I do not.

Q Mail exploders, excuse me, or list serves, and you don't know whether any adult verification system would be usable or [74] feasible for on-line chat rooms, do you?

A That's correct, I do not.

Q And you have no idea whether any of these adult verification systems would be feasible for nonprofit organizations that run largely or totally on volunteer labor, do you?

A No, I do not.

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[78]

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Q Turning to your declaration, Mr. Schmidt, you indicated and you indicated in your answers to Ms. Heins' questions that you have had conversations with parents in which they have expressed some concern about their children's access to sexually explicit materials on line, is that correct?

A That is correct, yes.

Q And in your experience parents concern in this record has no relevance to the origin of the material,

that is whether it comes from abroad or whether it is of domestic origin, is that correct?

A That is also correct, yes.

Q All they care about is what it—what the content actually is, not its geographic origin, is that accurate?

A That is accurate, yes.

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[115]

Q I believe Ms. Heins also asked you some questions in connection with the adult verification exhibits that you provided for the Court. Did you produce those exhibits to provide the Court in examples of some of those mechanisms that are now appearing on the Internet?

MS. HEINS: Well, I'll just object to the leading quality or the—

JUDGE DALZELL: I think he's trying to save time.

JUDGE SLOVITER: Oh, I think, yeah.

JUDGE DALZELL: He's just trying to save time.

BY MR. COPPOLINO:

Q Do you recall the question?

JUDGE SLOVITER: Go ahead and answer.

THE WITNESS: And, yes, that's why I produced them, to give the Court the sense of what was out there that people are putting on the sites now.

BY MR. COPPOLINO:

Q Does your declaration purport to indicate that you are an expert in the precise details about how each one of these examples works?

A No it does not.

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[131]

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Q Mr. Schmidt, Mr. Coppolino asked you a question about your understanding or about what is going on in terms of foreign countries treatment of sexually explicit materials on line. Isn't it true that there are countries which are far more lenient in their treatment of sexually explicit material, that is, whether it is deemed illegal or not illegal?

A That is correct, yes.

Q And in fact, when parents come up to talk to you about sexually explicit material on line, you've advised them that in fact, there are sexually explicit materials that might be deemed illegal in this country which are perfectly legal in other countries, isn't that correct?

A That is correct, yes.

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[138]

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JUDGE DALZELL: Okay. Now, same question is, you're the publisher of Vanity Fair and you have all of your issues on line. And the publisher comes to

you and says Mr. [139] Schmidt, I've got a problem. We had this very famous, controversial cover of the actress Demi Moore when she was pregnant and she was naked on the cover. What do I do—and it's all on line—what do I do now to prevent you from coming after me under the Communications Decency Act of 1996? What do you tell them?

THE WITNESS: Once again, in that context, it's a visual image for fun, basically. Not an educational—it could be educational, but for fun more than anything else. And I would tell them as well, depending upon the community in which that image could be viewed, that standard would probably apply towards the—pursuant of the—the rules of this law.

JUDGE DALZELL: So, it would be different in Brainard, Minnesota, perhaps, than New York City?

THE WITNESS: That's quite possible, yes, your Honor.

JUDGE DALZELL: And you'd tell them that?

THE WITNESS: And I would tell them that, yes, your Honor.

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Hearing Testimony, April 12 and April 15, 1996

Olsen, Vol. IV, 197:5-201:2; 219:23-221:18; 226:15-18; 235:8-236:24; 250:3-251:25; 253:3-256:6.

Olsen, Vol. V, 44:6-45:8; 45:18-46:15.

[197]

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MR. ENNIS: The third area in which we contest Dr. Olsen's expertise is with respect to either direct or third party verification of credit cards, including the technology of verification, the costs of verification and the types of transactions that would be verified.

BY MR. ENNIS:

Q Again, Dr. Olsen, with respect to that subject matter, is it fair to say that you have just simply read the Web pages of MasterCard and Visa since being retained in this litigation?

A I would have no technical knowledge of what MasterCard and Visa do.

Q Is it fair that you've just read their Web pages?

A That is correct.

Q And since being retained—

A That is correct.

Q —you've had no discussions with personnel at MasterCard or Visa?

A I have not.

Q And I believe you just said you have no expertise in the technology of credit card verification.

[198]

A The technology of what MasterCard and Visa themselves do, I have looked some at verification.

Q You have no idea what they would charge to verify for commercial transactions?

A I cannot say what they would charge.

Q And I take it you don't even know whether they would verify for a noncommercial transaction, that is, for a speaker who wanted to provide his speech for free?

A I would have no useful knowledge.

Q Now, with respect to third party verification systems, is it also fair to say that you have only looked at the Web pages of those third party verification systems since being retained in this litigation?

A Clarify what you mean by a third party verification system.

Q Other systems that will themselves go to Mastercard or Visa and obtain verification of credit card information, adult ID check systems—

A Oh, adult ID as to what they—I have read their Web pages and I have studied some of their technical documents.

Q And that's again since being retained in this litigation?

A That is correct.

Q Have you interviewed anyone at those third party verification systems?

A No.

[199]

Q Have you interviewed any speakers who have used those third party verification systems?

A I have not.

Q Have you ever used those systems yourself?

A I have not.

Q Do you have any idea how many people are registered with those systems?

A I do not.

Q Could be one, could be 1,000, could be 500, you have no idea?

A I have no idea.

Q Is it fair to say that you don't know how the "referral technology" between a third party verification system and a speaker would work, and you're foggy about how the third party obtains verification; is that fair?

A No. Referral technology, please clarify that.

Q Well, would you look, please, at pages 247 to 249 of your deposition transcript which we took last Tuesday. I'm using the phrase you used there. Have you located those pages?

A 247?

Q Right. And you were asked the question, "Okay, what happens when John comes to my site?

"Answer: Okay. My understanding is that somehow, and I would have to check the details, is that initially he [200] not having a password would be referred to adult check for which he would pay whatever it was and then be referred back. How that referral

technology works, I can't say right now. I'd have to look at the detail."

And then you say further down, "Question: Okay. Now, how does that work?

"Answer: As I remember the technology there, IC Verify provides—I believe it is a PC-based system, but they may have mentioned Unix (ph), I'm foggy there, whereby a phone line is connected to your machine or multiple phone lines, and then software makes the request. A call gets made to MasterCard, whoever they're connected to or the bank, however they do that, and a charge gets processed."

Do you recall that question and that answer?

A Yes, I do.

Q Does that—since you used the phrase "referral technology," what does it mean in that context?

A Referral—excuse me. Referral technology as I mentioned it there on page 248 has to do with when someone arrives at a site that would like to be verified, say by Adult Check or Validate, they are transferred back to the Adult Check site. They do that by means of code. They have the original people who want to be blocked, they have to put that code into their HTML pages. Now, the details of exactly what the syntax is without again looking at the spec I could [201] not quote to you, but the substantive nature of exactly how that mechanism works, I do understand that clearly.

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[219]

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Q Okay. Now, do you agree that there is nothing in current technology that would enable a speaker to go to a news group, a chat room, a list serve, and get back an adult access code [220] for everyone who was listening?

A I do not know of any such technology.

Q So again there's no way a speaker today could get assurance through technology that only adults were in the news group, chat room or list serve to which that adult wished to speak?

A If you want a positive verification, I know of no way. It would only have to be statistical as I mentioned before.

Q All right. Now, in addition to the adult ID system, which there's none in place today, another possible way for the speaker to verify age is through the proxy of a credit card, correct?

A Yes. I would be reluctant to say there is no other possible way. That is the only other one I know of.

Q Now, you've already testified that you don't personally know what it would cost you as a speaker to verify credit cards, and you haven't checked that cost with credit card companies.

A I have not.

Q And suppose you wanted to make your speech available for free. Do you know whether credit card companies would verify those noncommercial transactions at all?

A I have no knowledge. I would suspect they would not.

Q Let's turn to speaker verification of age through third party systems. This time the speaker is not doing it [221] directly. Your declaration suggests that there are springing up some third party systems that might do age verification—

A Such as Adult Check or Validate.

Q Adult Check or Validate. And again, what you know about those is what you learned from their Web pages recently?

A Yes. I read their technical specs.

Q I assume there's no—you're not aware of any adult ID list or adult access code that's available to those third party verification systems that's not directly available to you as the speaker; correct?

A From my reading of it what they're doing is they're building their own databases.

Q Based largely on the use of credit cards?

A Yes.

Q And again, since you didn't profess to know about this, you don't know what those third party verification systems would do with credit card information in order to verify it.

A No. I have no idea what they actually do with—

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[226]

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Q Ah. Well, speaking of laws, does your proposal make any assumptions about whether foreign speakers would responsibly label their speech -L18 or whatever convention is adopted?

A In doing my analysis of the problem I did not consider foreign speech because I was not aware that Congress could legislate foreign speech.

Q So with respect to any speech that for any reason is not labeled appropriately in the -L18 code or whatever other convention comes up, under your proposal that speech would reach the home?

A That is true.

Q All speech that's foreign posted where people don't care about United States laws, that would reach the United States also—

A Unless some other measure was taken, that is true.

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[235]

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Q Now, speaking not as a legal matter, I'm not asking for a legal conclusion under the Communications Decency Act, but if you were a speaker and you thought about posting a centerfold from Playboy Magazine, would you personally think that that image might be indecent or patently offensive for persons under 18?

A You're asking me for a conclusion about the decency of a particular piece of—

Q No, I'm asking for your personal opinion, would you personally think that that image might be indecent or patently offensive for persons under 18?

A So you're asking me for a conclusion as to patently offensive?

Q You personally.

MR. BARON: Objection. It's beyond the scope.

JUDGE SLOVITER: What? Excuse me?

MR. BARON: It's beyond the scope of his direct examination.

[236]

JUDGE SLOVITER: Okay. A lot of the witnesses have been so asked, you know, from both sides, but go ahead. It is beyond the—

JUDGE DALZELL: But so what?

MR. BARON: We're presenting Dr. Olsen as a technical expert.

JUDGE BUCKWALTER: We understand, but —

MR. BARON: Not as a speech witness.

JUDGE BUCKWALTER: We'll let him answer that question.

JUDGE SLOVITER: We're going to let him answer it.

THE WITNESS: Okay. If we consider the local community which consists of Dan, Dan would be offended.

BY MR. ENNIS:

Q And how about the seven dirty words?

A Dan would be offended.

JUDGE BUCKWALTER: Who's Dan?

JUDGE SLOVITER: Who's Dan?

THE WITNESS: That's me, I'm sorry. That's me. (Laughter.)

JUDGE DALZELL: Oh, he's the community. He is an expert on what would offend him.

THE WITNESS: That's a relatively small community, but it's the one I know best. (Laughter.)

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[250]

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Q You don't know whether the credit card companies will verify credit cards for me if I ask them to without attaching a commercial transaction to it, correct?

A I do not know—I guess the easiest way to say this is I do not know nor do I particularly believe that for free they would do the validation you want.

Q So if I want to comply relatively quickly with this statute, I'm probably going to have to—one of my options is I'm going to have to talk to the credit card companies and see if they'll let me pay them for each of my 50,000 visitors to verify the credit cards. And we don't even know whether they'll say yes or not, but at least that's one possible approach I have, correct?

A That is.

Q And I don't know whether today that approach is going to work or not, right?

A Well, wait a minute. I mean all—we would have to process some transaction.

Q Okay.

A Whether or not—I would be enormously surprised if MasterCard says no, we will not let you charge something on our service.

[251]

Q Now, the alternate approach that you propose is this adult ID system, correct?

A Mm-hmm.

Q And you propose in your declaration three or four companies that exist now that will do this, correct?

A Yes.

Q One example is Adult Check, correct?

A That is correct.

Q And I believe as you told Mr. Ennis, what you know about Adult Check is that you looked at their Web site.

A I looked at their Web site and I also studied their specification of how they claim that their stuff works.

Q Did you make any effort to determine whether the people behind Adult Check are reputable or not?

A No.

Q So you don't know if I go to Adult Check and put my credit card number in there, you don't know whether they sell it to other people or not?

A I have no idea what they do.

Q You don't know if they sell it to people who—let me ask this. Did you look at what sites currently use Adult Check?

A No.

Q Would it be fair to say that the sites that currently use services like Adult Check are essentially pornography sites [251] of the kind in the Coppolino book? (Laughter.)

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[253]

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A The answer, Mr. Hansen, is that when I believe either Adult Check or Validate had a long list advertising who it was that had already signed up with them and which providers were going through them, I did not look at that list at all, I didn't care. I was only interested in how does this technology work. So I really could not characterize what kind of sites they were, who they were, I have no idea. I only looked at the technology.

Q I want you to assume hypothetically that if we booted the computer back up right now and got the Adult Check Web site on the screen and looked at the list that every single Web site currently listed under Adult Check would be what you and I would fairly characterize as triple X or true pornography sites.

A That would not surprise me, but I have no knowledge.

Q Okay. So under your proposal if I'm this hypothetical Electronic Frontier Foundation or Critical Path AIDS Project, I have to send all of the 50,000 people who come to my site a day to those people and ask them to list themselves on that site, on Adult Check site, which we just established largely as a place where people list themselves who want to get access to pornography—

[254]

JUDGE SLOVITER: We haven't established, we've assumed.

THE WITNESS: No, we didn't—we did not establish.

JUDGE DALZELL: We'll assume.

THE WITNESS: Yes.

MR. HANSEN: You're correct, you're correct.

BY MR. HANSEN:

Q I have to send all of my potential readers off to this list that hypothetically includes only sites that are pornography sites, correct?

A I guess your question is would I have to send these people off to them, and the answer is—before I answer the question, I would like to complain slightly about the 6:15 characterization. The reason I complain about that is because what it does is it precludes a number of other actions you might take. If we postulated a one-month characterization, for example, then it is possible that the ACLU and the Electronic Frontier Foundation and any number of others could say we really don't want to be associated with Adult Check, and you could have established an equivalent

service of your own that would not have all these people on it and then you would not have to have guilt by association. When you characterize 6:15, obviously you could not take any of those measures because they will take time to accomplish, but they are possible.

[255]

Q Well, Dr. Olsen, my colleagues have helped me out while you were doing that answer, and they have showed me Exhibit 6 to Mr. Schmidt's declaration, which I'd like to show you.

(Off the record.)

BY MR. HANSEN:

Q Would you agree with me that most of those sites appear to be pornography sites?

A I don't know what's there, but I wouldn't go there.

JUDGE DALZELL: Well, chick of the day could be poultry.

JUDGE SLOVITER: Oh, you really are in for ducks and poultry. (Laughter.)

JUDGE DALZELL: It's a leitmotif.

BY MR. HANSEN:

Q Nor would you want to be associated with that list, would you?

A No, I wouldn't.

Q In addition to that, if I were to send all of my potential listeners to Adult Check, my listeners would have to pay money to Adult Check in order to get an adult ID from Adult Check, correct?

A That is my understanding.

Q And if I have to comply with this law quickly, that's my only option at this point, isn't it?

A If you were assuming compliance within 6:15, yes. If [256] you're assuming compliance within a month or two, you could with your community of friends create an equivalent site where you would not have to have bad neighbors.

Q And it might well cost me a significant amount of money to set up an equivalent site, mightn't it?

A I couldn't judge how much money it would cost you to do that.

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[44]

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Q Now, your 90 percent statistical significance figure assumes, does it not, that all of the speech has been properly tagged and labeled according to your proposal?

A Correct.

Q And that assumes that all of the speech that originates abroad by foreign speakers has been tagged and properly tagged?

A I think I have stated previously that we have not done anything relative to foreign speakers and we would have to rely upon Surfwatch or Netnanny technology for foreign speakers.

Q Well, then if we assume that some of the speakers are foreign speakers and they're not tagging at all would your 90 percent go down considerably?

A The 90 percent—I think you're fallacious here. The 90 percent is if I am a U. S. speaker how much can I depend will actually get through to minors, that doesn't say anything about how much minors—how much potential sexually-explicit material has come to a minor, that's a different question.

Q I understand that, I'm asking you a different question. [45] I'm asking you to assume all of the communication entities downline change their browsers, change their end-user software, change everything so that your L18 proposal could technologically be implemented, if no foreign speaker tags or labels their speech will that speech be kept away from 90 percent of minors in America?

A That speech, no, but I didn't remember that there's anything in the CDA that involved those speakers.

* * * * *

Q I assume it's of course possible that there are some speakers out there who will willfully violate the law and not tag or tag inappropriately, correct?

A That's a good presumption.

Q And I assume there are a larger number of speakers out there who will tag, but they will not exactly know what's patently offensive or not and will make the wrong judgment and say my speech is appropriate for minors when later it's [46] turned out some community thinks it's inappropriate, that's possible too?

A That's possible.

Q All of that speech, whether willful violations of the Act or inadvertent violations of the Act, that will reach minors in America, correct?

A So will slander and fraud, yes, it's the same thing.

Q But it would not, would it, if you were using the PICs technology set to the default to tag—to reject all un-tagged speech and to reject all tagged speech that has not been approved by a third-party rater, none of that would reach minors in America?

A That is correct.

Q Even foreign postings?

A That is correct.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 96-963

AMERICAN CIVIL LIBERTIES UNION, ET AL.

v.

JANET RENO, ATTORNEY GENERAL
OF THE UNITED STATES

Civil Action No. 96-1458

AMERICAN LIBRARY ASSOCIATION, INC., ET AL.

v.

UNITED STATES DEPT OF JUSTICE, ET AL.

City of Philadelphia
State of Pennsylvania

DECLARATION OF KIYOSHI KUROMIYA

I, Kiyoshi Kuromiya, declare:

1. Since its founding in 1989, I have been Director of Critical Path Project, Inc. and Editor of Critical Path AIDS Project, an AIDS treatment newsletter with a circulation of 10,000 and a suite of electronic services designed to get consistent, accurate and

easy-to-understand AIDS prevention and treatment information out to the field in as short a time as possible and to keep it accurate and complete as well as constantly updated.

2. The Stipulations provide greater detail on the nature of the services provided by Critical Path AIDS Project. This declaration repeats information in the Stipulations only to the extent necessary for this declaration to be coherent.

3. Because we have operated a 24-hour AIDS treatment telephone since 1989, we have years of experience in disseminating complex and sometimes technical treatment and prevention information to lay persons.

4. Critical Path AIDS Project also operates a computer bulletin board system. (BBS).

5. In addition, since May, 1995, Critical Path AIDS Project has been providing a comprehensive AIDS Web page on the World Wide Web. Our web pages during the period February 4, 1996-March 4, 1996 were accessed approximately 98,000 times, averaging 3,300 times per day.

6. Critical Path AIDS Project Web page links directly or indirectly to thousands of databases in all fifty states and many countries, including databases at research institutions. Someone who has accessed the page can look up and retrieve documents from the far reaches of the world, without technically leaving the Critical Path AIDS Project's Web page. The information available in this manner is discussed in the Stipulations.

7. Critical Path also hosts the Web pages of a number of organizations, regional and national: We The People Living with AIDS/HIV of the Delaware Valley, Minority AIDS Project of Philadelphia,

Fight-the-Right Network, ACT UP/Philadelphia, Philadelphia Community Health Alternatives, Prevention Point Philadelphia, PhillyPAWS, From All Walks of Life, AIDS Information Network, AIDS Research Information Center, Californians for Compassionate Use, the Buckminster Fuller Institute, Grassroots Queers, AIDS Services in Asian Communities (ASIAC), Gay and Lesbian Latino/a AIDS Education Initiative (GALAEI, outreach to the Spanish-speaking community and to male and female sex workers), Youth Health Education Project, and others.

8. Critical Path also hosts electronic mail lists, including one for the Fight-the-Right Network, the Interfaith Working Group, and for Penn Consortium (HIV doctors and researchers in the Philadelphia area).

9. Critical Path offers SLIP (Serial Line Internet Protocol) accounts and additional software to users free of charge. The software is described in the Stipulations.

10. Critical Path has developed software interfaces for the huge data resources it makes available. These interfaces are described in the Stipulations.

11. Critical Path AIDS Project has offered its shell account and/or SLIP account users access to a full-feed of some USENET newsgroups

12. In October 1995, Critical Path AIDS Project was getting 10,000 access requests per day from all over the world, including 110 from Finland, for example, and a handful from Estonia, Singapore, and Bolivia. We can provide monthly statistics on this use of all our Internet services by day, by hour, by service, or by page used.

13. Because most cases of AIDS are transmitted through sexual contact, the information must deal with descriptions of risky sexual activity. In order to ensure that readers understand the materials, it often must be written using street or colloquial language rather than clinical language in order to be understood by most lay persons. Further, because AIDS can be transmitted when men have sex with men as well as when women have sex with men, we frankly discuss the types of sexual activities that might put a person at risk for contracting AIDS and how a person might minimize or eliminate the risk of infection from HIV or other sexually transmitted diseases. Thus, our Web page contains or may contain some explicit language and discussion that might be considered "indecent" or "patently offensive" to some individuals.

14. Critical Path encourages frank discussion on matters of illness and sexuality and drug use. We recognize cultural differences which may require different treatments or information for different communities. We recognize issues particular to certain communities, for example Asian-Pacific Islanders in Philadelphia tend to be recent immigrants for whom English is a second language, men-who-have-sex-with-men, and in their 20s. We presume many of them contracted HIV while still in their teens. Providing complete and accurate prevention and treatment information to diverse communities, diverse age groups, diverse language requirements, and diverse social groupings is a challenge. Out of that challenge grew Critical Path's suite of information services.

15. I do not know what "indecent" and "patently offensive" mean. These terms are vague and can be

variably interpreted, in English as well as other languages and cultures. Some people would define all AIDS information as "offensive" or "indecent." Safer sex information must be described candidly for it to be meaningful for many, and that very frankness may be considered by some to be "offensive" or "indecent." I know this to be true from years of experience talking frankly and directly to persons at risk of infection on a 24-hour telephone hotline which we operate. The hotline has received an average of 10 to 15 calls per day since 1989. Discussion of some of the sexual acts, including those acts engaged in by persons of differing sexual orientations, and the preventive measures recommended for people engaging in those acts may be considered by some to be "offensive" or "indecent." I am concerned that the law is now written in such a way that I might face possible criminal prosecution.

16. In my opinion, it is critical that information about AIDS be disseminated as widely as possible, and that it be written in language accessible to all. I believe it is critical that teenagers as well as adults have access to such information. In my view, the information that Critical Path provides saves lives of both teenagers and adults and any attempt to censor or restrict the free flow of this life-saving information would be a critical public health mistake.

17. I believe information provided by Critical Path is now read by teenagers. In addition, we are currently working with the Youth Health Empowerment Project (YHEP), which provides health counseling, outreach and AIDS information to youths. Thus, additional teenagers will be afforded the same level of safer sex information we currently provide the community at large. We will also be hosting a Web page for YHEP on our system.

18. Critical Path on its Home Page alerts its readers that some of the information therein may be upsetting to some readers because it deals with sexually transmitted disease and may be unavoidably sexual or morbid in nature. However, there are many different ways to access the information on our Web site and some of those ways bypass our initial Home Page and thus would bypass the disclaimer.

19. Critical Path understands that the CDA provides a defense for "good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors" to "indecent" or "patently offensive" communications. Critical Path knows of no way to restrict or prevent access to "indecent" or "patently offensive" material because: 1) We do not know what "indecency" and "patently offensive" means, and we do not know whether any of our information falls within these definitions, and 2) We have no way of knowing with any certainty the name, age, nationality, or other characteristics of individuals or groups of individuals who use our electronic services. We believe that individual users and organizations who use our services to communicate online are unable to avail themselves of the defense for the same reasons. They are all non-commercial organizations and individual speakers, the vast majority of whom lack the legal acumen needed to make judgments about the legality of their speech, and who lack the technical skills and money needed to develop a system that might verify the age of those with whom they speak.

20. Without drastically changing the way the Internet currently operates, any attempt to screen "indecent" or "patently offensive" material from web sites, online mailing lists, bulletin board systems,

newsgroups, or chat rooms would automatically reduce the content of adult speech on safer sex and AIDS treatment issues in those forums to speech suitable for minors, and probably fail to communicate useful information.

21. Critical Path understands that the CDA also provides a defense if the speaker restricts access by "requiring use of a verified credit card, debit account, adult access code, or adult personal identification number." Such a system would be inconsistent with the mission and purpose of Critical Path AIDS Project because: 1) we function as an AIDS information provider for teenagers; 2) we provide anonymity for all our users to help them maintain confidentiality and privacy when accessing our information; and 3) all of our services are free.

22. First, because AIDS is a sexually transmitted disease and because many teenagers are sexually active, including two thirds of all students before leaving high school, we feel it is important to provide AIDS prevention and treatment information to all individuals who seek us out—whether they are adults or teenagers. In March 1996, the President's Office of National AIDS Policy reported that the rates of HIV transmission among teenagers show phenomenal growth even as rates among gay white adults level off. One quarter of all new HIV infections in the U.S. are estimated to occur in young people between the ages of 13 and 20. That means that two Americans under the age of 20 become infected with HIV every hour of every day. And, worldwide, more than seven million persons between the ages of 15 and 24 have already been infected with HIV. A recent survey of gay male teenagers showed that teenagers in underserved communities, particularly Asians, Latinos and Latinas,

and African Americans show HIV prevalence rates from 6% to 10% and rapid growth. Age verification would defeat the purpose of our AIDS prevention outreach programs and discussions to teenagers.

23. Second, because AIDS and its several routes of transmission are stigmatized by society in this country and abroad, it is important that we preserve anonymous access to this information. To protect the identity and privacy of our users, we permit those on our system to use "handles" rather than their real names. The Internet is particularly suitable for providing access to AIDS information privately and confidentially—to sexually active teenagers; intravenous drug users and former drug users; homosexuals, heterosexuals, and bisexuals; male and female sex industry workers; hemophiliacs; and persons not infected with HIV. It is vital to our user-base that our users' confidentiality is not violated. We also strictly abide by the Pennsylvania Act 148 of 1990, the "Confidentiality of HIV-Related Information Act." As operators of this system, it would be a violation of confidentiality and privacy for us ever to read person-to-person online communication through e-mail unless it is specifically addressed to us. We have no way of monitoring or qualifying in any way the high volume of e-mail that passes through our system. Because most of our users demand anonymity on our system when speaking themselves and when accessing information, we would lose them if some kind of personal identification were required in order to verify age.

24. Third, we currently provide all of our electronic services for free, both to individuals and organizations. Most of our users come from underserved communities which have been hardest hit by

the AIDS pandemic. We strongly believe that cost should not be a barrier between our users and life-saving AIDS prevention and treatment information.

25. Even if an age verification system were consistent with our mission, it would require a vast technical overhaul and major changes to the way online communication currently takes place.

26. Applying my knowledge of the way that e-mail, mailing lists (or listservs), Usenet newsgroups, and chat rooms currently function, I believe that the CDA defenses are simply not available to Critical Path and its users when they communicate through these kinds of online forums. There is no way to screen the volume of traffic from a multiplicity of access points; it is not possible or reasonable to monitor private conversations anymore than the phone company could monitor all phone conversations that take place within its system. And fundamentally, we believe teenagers are entitled to the same quality of safer sex information as adults.

27. Critical Path receives dozens of e-mail information requests daily, mostly from strangers of whom we have no personal knowledge. We have no way of verifying the age of those who request our information by e-mail, and we know of no age verification system we could implement for e-mail. (Such a requirement would be similar to requiring that we verify the age of every person to whom we provide information by phone.) Similarly, users of our free Internet e-mail accounts have no way of verifying the age of the persons with whom they communicate by e-mail.

28. Currently, Critical Path hosts and administers several moderated and unmoderated online mailing lists in which people communicate about various

issues regarding AIDS/HIV and its treatment. The administrators and moderators of these mailing lists have no way of knowing the identity, age, or any other characteristics of the subscribers who will read postings to the list. Subscriptions and cancellations of subscriptions are processed entirely automatically by our listserv software.

29. Speakers who post messages to the lists also have no method of identifying the age, gender, or other characteristics of the other subscribers who will read his or her message. When Critical Path, or any other speaker, posts a message to the list, the message is automatically distributed to all of the other subscribers on the list.

30. Critical Path currently offers our online users access to approximately 6,000 USENET newsgroups on a variety of subjects as part of our free Internet access services. Anyone in the world with access to Usenet can post a message on a particular topic at any time, and any other user with access to Usenet can read (and reply to, if desired) the message at any time. The number of potential speakers or readers of any particular message posted to Usenet is the entire number of online users with access to Usenet—literally millions of online users. Critical Path simply has no way of verifying the age of the recipients of the nearly 2 gigabytes of Usenet newsgroup postings which pass through our system each and every day. To do so would be the equivalent of monitoring 152 million words of text (three sets of the Encyclopedia Brittanica) or 5,000 book-length documents the equivalent of which is posted to Usenet every day of the year including weekends and holidays. Similarly, Critical Path users who post messages to Usenet

have no way to determine the age or other characteristics of persons who read their messages.

31. Although Critical Path does not currently operate chat rooms for simultaneous online conversation on a particular subject, we plan to implement such areas on AIDS treatment and on safer sex issues in the future. While the technology will allow speakers in a chat room to know the number of other participants in the "room," there will be no way for Critical Path or for speakers in the room to determine the real name, age or other characteristics of the participant.

32. In the field of AIDS, support groups are widely used and have been found to be an effective means of engendering trust and providing valuable (sometimes lifesaving) information and emotional support in a protected environment of confidential communication. Chat rooms and oline BBS discussions can serve some of these functions on the Internet.

33. While the age verification defense in the CDA might be technologically *possible* for the Critical Path web site, it is both technically infeasible and a severe economic burden to our non-commercial web site.

34. Critical Path understands that it would be possible to set up a system so that users of the Critical Path web site would be required to insert a credit card number before they gained access to the web site. We do not have a commercial relationship with our users, and we do not want to require our users to supply us with commercial information before they can access our free material. Requiring a credit card would exclude huge numbers of our adults in this country and abroad who do not have credit from speaking and accessing information online. Critical

Path now gets approximately 500 overseas accesses from 61 countries each day. Some people overseas have *no other access* to accurate information on AIDS/HIV.

35. Mandating any other kind of adult access code or personal identification number would require our users to send us pre-registration information before they could gain access to our services or speak online. Critical Path does not have the staff, the equipment or ability to operate a pre-registration system, since up to 99% of our users reach our web page and our other internet services from access points beyond our control, and these access points are often abroad. Further, we would lose much of our user-base because a user could not maintain anonymity through such a registration process and we could no longer assure our users of confidential access to AIDS treatment and prevention information.

36. Even if a credit card verification system were technically feasible for the Critical Path web site, creating such a system would be a tremendous economic burden, given our limited resources. We have only one full-time employee and a small budget of approximately $100,000 per year. Based on the current cost of credit card verification, which is approximately $1 per verification transaction, our web page alone would cost us up to twice our entire annual budget each month simply to verify ages. The cost would force us to shut down our operation, with an accompanying loss to our community of peer-operated public health services for people with AIDS and people at high risk for contracting AIDS.

37. Other age verification systems for our web site that would require an advance registration process would also be a tremendous economic burden, as they

would require additional employees and resources to process the registration information for every online user and to keep an updated database of information in case of investigation. Critical Path has one full-time and one part-time employee. Such a system would require us to hire dozens of additional employees to attempt to verify ages for the 10,000 individuals who use our Internet services each day.

38. In contrast to our Web site, I do not know of any technical way for online users of Critical Path's e-mail services, mailing lists, Usenet newsgroups, or chat rooms to verify the age of those with whom they speak. Even if such a system were to be developed, it would be tremendously burdensome economically to our non-commercial speakers, many of whom come from economically deprived communities and do not have credit cards.

39. Even if age verification were not technically infeasible (if not impossible) and economically burdensome, Critical Path and its users would have the additional economic burden of dividing all communications into two types—those that are "indecent" or "patently offensive" and those that are not. This would essentially require creation of two Critical Path web sites—one for adults, and one for minors. The impact on individual users would be to deprive them of full access to parts of documents and therefore we would have to restrict access to entire documents because we would not know which sentences should go in the restricted areas. The documents as a whole would discuss issues of sexual practices and how to avoid risky behaviors and, if excerpted, would provide insufficient (and possibly unclear) information.

40. In addition, our Critical Path AIDS Project web page links directly to several hundred other web sites and indirectly to many thousands of sites. We have no control over the content in those sites, and our one full time employee could not possibly review the vast amount of content available in all these linked sites. Yet to sever the links to these other web sites would destroy one of the most popular and useful features of the web—the ability to gather information from a wide variety of sources through the linkage of related documents and sites.

41. Critical Path encourages the copying, republishing, and re-posting of information on our Web page. Because we have no control over the context or the integrity of the content when it is re-posted, we are concerned because the CDA is unclear whether the original creator of the information could be held criminally liable if the information is re-posted in a way that could be interpreted as "patently offensive."

The Kuromiya exhibits provide accurate copies of pages I personally downloaded from Critical Path AIDS Project during the week of March 11,

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 8th day of March, 1996

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Kiyoshi Kuromiya

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 96-963

AMERICAN CIVIL LIBERTIES UNION, ET AL.

v.

JANET RENO,
ATTORNEY GENERAL OF THE UNITED STATES

No. 96-1458

AMERICAN LIBRARY ASSOCIATION, INC., ET AL.

v.

UNITED STATES DEP'T OF JUSTICE, ET AL.

SUPPLEMENTAL
DECLARATION OF ROBERT B. CRONEBERGER

I, ROBERT B. CRONEBERGER, pursuant to 28 U.S.C. § 1746, declare:

1. Since 1986, I have been Director of the Carnegie Library of Pittsburgh. I submit this declaration in support of the complaint in this action and the plaintiffs' motion for injunctive relief against provisions of the Communications Decency Act of 1996 (the "Act").

2. The Stipulations provide greater detail on the Library and the nature of the services we provide. This declaration repeats information in the Stipulations only to the extent necessary for this declaration to be coherent.

3. I have Bachelor of Arts and Master of Arts degrees in Classical Languages, and received my Master of Library and Information Sciences degree from Drexel Institute of Technology in 1962. For eight years, I held various positions with the Library of Congress; part of my responsibilities included working on the Library's development of electronic cataloging. I later spent nine years, first as Deputy Director, and then Director, of the Memphis & Shelby Public Library and information center in Memphis, Tennessee. Thereafter, I served almost two years as State Librarian and Archivist for the State of Tennessee, before assuming my current position.

4. I have been a member of the American Library Association ("ALA") for years, and have served on various ALA boards and committees, including the Intellectual Freedom Committee. I am currently a member of the ALA's Legislation Committee. At the state level, I am a member of the Pennsylvania Library Association. In addition, I am active in many local organizations, including the Greater Pittsburgh Literacy Council, of which I have been President, and the Commission on the Future of Libraries in Allegheny County. I have authored or co-authored several articles in my field, conducted numerous workshops, and engaged in extensive consulting and lecturing, and teaching as an adjunct faculty member at the School of Library and Information Science at the University of Pittsburgh.

5. A copy of my most recently prepared curriculum vitae is marked as Plaintiffs' Trial Exhibit 280.

6. Through my educational studies, work experience and professional activities, I have gained comprehensive knowledge regarding the activities, practices, and policies of libraries—large and small—across the country.

7. Carnegie Library of Pittsburgh has one main building, 18 branches, one library for the blind and disabled, and several bookmobiles. All our physical locations are within Pittsburgh. We serve as the district library for all public libraries in Allegheny County, Pennsylvania, and, and will soon become the college library for a four-year college in downtown Pittsburgh that is consolidating its library with ours. We also serve as a state resource library for the State.

8. We currently have about 6 million items in our collection. Two million of these are listed in our online catalog and include: CDs and records, journals, films, books and other material in electronic format. The other 4 million are comprised of such material as government documents, microfiche, slides, individual periodical and journal issues, and patent-related material.

9. Library cards for the Carnegie Library are issued, free of charge, to anyone in Allegheny County. The card entitles the cardholder to borrow from the library's collection, as well as to access, through us, materials from academic, special, and public libraries throughout the world. We currently have approximately 277,000 cardholders, of whom about one-third are minors.

10. As Director, I serve as the CEO of the Carnegie Library, overseeing all operations of the

institution, including its partnerships with other institutions. We have 580 employees, twenty of whom work in our automation department.

11. It is the mission of the Carnegie Library of Pittsburgh to provide the widest array of information to the widest possible audience—both adults and minors. To that end, the library makes no distinctions between patrons on the basis of age. The library does not offer separate library cards for adults and children and the library does not place restrictions on what minors can read, use or borrow in the library. Those same principles recently were extended to electronic access of library information. Carnegie Library of Pittsburgh is committed to offering its patrons—both adults and children—access to information on the Internet. Our service philosophy is based on the principle that only parents have the right to restrict materials, and only for their own children. The library's Board recently unanimously adopted the ALA's "Access to Electronic Information, Services and Networks: an Interpretation of the LIBRARY BILL OF RIGHTS," a copy of which is marked as Plaintiffs' Trial Exhibit 233.

12. The Carnegie Library of Pittsburgh's mission is based on the intellectual principle that an informed citizenry is essential to a democracy. However dangerous specific thoughts, ideas or expressions might be to a society, it is far more dangerous to suppress or withhold these expressions to the society which must confront them. Age must not be a restriction imposed by anyone except the parent of a child, who can judge the maturity of that child. The quality of writing is based not on its ability to idealize or lecture, but on its ability to reflect and confront reality.

13. The Carnegie Library of Pittsburgh has two servers connected directly to the Internet by a T1 line: http://www.clpgh.org and http://trfn.clpgh.org ("The Three Rivers FreeNet"). The Library's web sites on these servers are open to anyone on the Internet. We do not restrict access in any way, and do not charge any access or user fee.

14. The library makes computers (PCs) available at each of its locations for use by patrons. We are also implementing a new program of installing PCs in public housing communities in the city. Individuals can access sites on our servers as well as the Internet using this equipment. Patrons can also call into our servers from their home computers. In addition, the library is in the process of hooking up 38 other public libraries in the region to our computer system.

15. At our online sites, the Library offers patrons the library's catalog, various information lists, news about current events, and numerous publications. For example, the Carnegie Library of Pittsburgh posted on the Three Rivers FreeNet the text of a study entitled *Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces, and Territories* prepared by Martin Rimm, Principal Investigator.

16. Our catalog is posted at our Web site to permit patrons to search the collections available at the library and request material from the library; we do not maintain a physical card catalog. Some titles may contain language that members of some communities might find "indecent" or "patently offensive" for minors. For example, the following titles might be considered "indecent" or "patently offensive" for minors by some persons: (1) *So Fucking What?* by A.M. Wellman (Random House, 1990); and (2) *The Ice Opinion: Who Gives a Fuck?* by Ice-T (as told to Heidi Siegmund) (St. Martin's Press, 1994). Similarly, the following music titles might be considered "in decent" or "patently offensive" for minors by some persons: "Fuckin with my head"; "Soul sucking jerk"; "Mutherfuker"; "Get off my dick and tell yo bitch to come here." Often catalog titles are accompanied by abstracts or descriptions of the particular item's contents. These descriptions too might be considered by some to be "indecent" or "patently offensive" for minors. For example, the online catalog entry for Erica Jong's book *The devil at large* includes the following chapter title description of the book's contents: "Crazy cock in the land of fuck." These titles and descriptions can be found at our Web site. Copies of the catalog entries are marked as Plaintiffs' Trial Exhibits 201, 202, 274, 275 and 276. These are popular titles in our collection. In fact, the book by Ice-T and the rap-music CDs are particularly popular with teenagers. To remove that material from our online catalog would be a disservice to our young patrons.

17. Despite the fact that I have reviewed the Act, I cannot determine whether the Carnegie Library could be criminally prosecuted under the Act for placing these titles in the catalog available on our Web sites or for making the Rimm study available. Judging from the finding that George Carlin's use of the "seven dirty words" was found to be indecent, it would appear that the use of such slang language for sexual activities, sexual organs, and excretory functions is covered by the Act. Yet, it would be

antithetical to our mission as a library to remove this information from our Web site, or to restrict access to this information.

18. I am familiar with the provisions of the Act. The terms "indecent," "patently offensive," and "contemporary community standards," as used in the Act, are vague. I have no clear understanding of what materials would be considered "indecent" or "patently offensive" for minors by some communities, or whether the Act provides a defense for materials with serious literary, artistic, educational or scientific value. It also is unclear which community standards govern the interpretation of whether content posted on the Internet is "indecent" or "patently offensive." Further, I cannot discern whether the Act applies where the person displaying material deemed "indecent" or "patently offensive" had the intent to be patently offensive or simply had the intent to display the material later found objectionable.

19. The uncertainty as to what "community standard" controls is particularly troubling for libraries.

The Carnegie Library serves a relatively conservative community; therefore, what may be deemed appropriate for minors by some in New York City is not likely to be subject to the same parameters as what is deemed appropriate in the greater Pittsburgh area. But, even within this regional area, there are very different "communities," drawn together not just by ethnic and cultural bonds, but by common religious and aesthetic principles, as well. It is my experience that each community may have a very different sensibility concerning minors' access to reading materials.

20. In my experience, the materials in libraries most often challenged by members of the community

are those challenged on the grounds they are inappropriate for minors. Recently, parents have sought to remove two award-winning children's books from a local school curriculum because the content was thought inappropriate—*A Bridge to Terabithia* and *Julie and the Wolves*. In my capacity as a member of the ALA's Intellectual Freedom Committee, I am very familiar with communities' attempts (some successful) to ban classic works of literature, on the grounds those books contain material inappropriate for minors. A compilation of books recently challenged or banned is marked as Plaintiffs' Trial Exhibit 227.

21. Whatever community standard governs, it is conceivable our posting of the *Marketing Pornography on the Information Superhighway* could pose a risk of criminal prosecution under the Act. There are many questions regarding the validity of this study but since it served as the basis of "On a Screen Near You: Cyberporn"—the July 3, 1995 *Time* cover story article by Philip Elmer-Dewitt, the Carnegie Library believed it was important to make it available for research and analysis. The study has been accessed by many users seeking both to defend and to refute its thesis. The study contains vivid descriptions of the sexual images the study's investigator found. An excerpt is marked as Plaintiffs' Trial Exhibit 203.

22. Carnegie Library also posts online journals and journal abstracts, including such popular magazines as Cosmopolitan, Playboy, and Vanity Fair. Many of these appear on our Web sites in full text. The Library is concerned that articles and images in these magazines may be deemed "indecent" or "patently offensive" for minors by some persons.

23. We are committed to keeping the above-referenced materials, and similar materials, available at our Internet sites, although we obviously are concerned about criminal prosecution and realize that such a risk exists. It would be contrary to our mission to remove these materials from our Web sites. If the Act is not enjoined, the Library might be forced to remove these titles, the study, and similar from its online sites, despite the fact that these materials offer our patrons valuable information.

24. Users who access our Web sites can link to other Web sites and the Internet. We can ascertain which site a user first links to after leaving our sites, but nothing thereafter. Therefore, to the extent the Act seeks to obligate the Library to monitor and/or control what Internet content users access through our servers and Web sites, we cannot, as a technical matter do so.

25. I understand that the Act provides a defense to a library or librarian if steps have been taken to ensure that only individuals eighteen or older have access to the Library's online sites. I have discussed this option with our computer staff and we have concluded that it would be technically difficult and economically infeasible for the Carnegie Library of Pittsburgh to establish a system to block access by individuals under the age of eighteen. Many of our users connect to the system by telephone, and there is no easy method by which to determine the age of the user.

26. I asked my computer staff to investigate the potential costs to the Library if it were forced to create an "adults only" site or sites on our servers, pre-register Internet patrons, monitor access to the

sites, and evaluate the materials that would need to be segregated. The costs would be astounding.

27. I understand that the Act permits "verified credit card identification" of Internet users who wish to access our online sites. My staff has discussed the feasibility of this option with PNC Bank, with whom we have a VISA/Mastercard relationship because affiliated organizations sometimes charge for attendance at lectures and concerts held at the Library. We were informed that there currently is no way for the bank to verify credit card identification in contexts, such as ours, that are unrelated to purchases, and the bank was not interested in providing such services. The bank indicated that it had no way to determine how much it would cost to set up such a service or how much it would cost per "verification." We know of no already established means of identifying online adult users by access number or other identifier; thus, Carnegie Library would be forced to develop its own user identification system in order to avail itself of the Act's defenses.

28. To our knowledge, there is no existing software available that would enable us to pre-screen users of our online sites. Potential users will be forced to pre-register with Carnegie Library if they wish to access information posted on our sites, and prove they are 18 or older. We would have to hire at least 15 new staff members, at an annual cost of $ 195,000 simply to enable us to complete this task of pre-registration of just existing cardholders.

29. But it is not simply cardholders that utilize our Web sites. Assuming only individuals from Allegheny County utilized our sites, we would need an 65 additional staff members to pre-register and maintain

data files for this local 1,300,000 population. The cost would be about $ 845,000.

30. Of course, the information on our online sites now is accessed by people all over the world. Information gathered by my staff shows that users from across the globe—including, for example, Guam, the United Arab Emirates, Argentina, Finland, Indonesia, Morocco, and Japan—have accessed our Internet sites. We have no way of knowing who they are, let alone how old they are. If an identification system had to be installed, these people would need to contact Carnegie Library, verify their age and pre-register for access to our sites. Given the difference in time zones, the Library would be forced to maintain a 24-hour staff to adequately serve potential users of our site. The beauty of Internet availability of information is that users can access that information at any time at their convenience or when an urgent need for the information arises. They are not tied to library hours. If Carnegie Library is to fulfill its mission as a provider of information, a 24-hour Internet staff will need to be maintained. This will add additional costs.

31. My computer staff has advised me that it would cost roughly $30,000 to purchase or create software that would review our online material and attempt to select out "keywords" that might signal that the information could potentially be deemed "indecent" or "patently offensive" by some community standards. However, this system would not be foolproof and would be both underinclusive (not finding all the potentially problematic material) and overinclusive (capturing too much material). Sex-related terms, for example, will segregate sex education and sexually related medical material. We have concluded, therefore, that any segregation of our online materials into

acceptable and potentially inappropriate for minors categories would have to be done by hand, using human judgment (presumably, with the assistance of legal counsel). In order to avoid potential criminal liability, any reviewer would have to err on the side of overinclusion in segregating out "adults only" material.

32. We currently have over 2 million items in our catalog. The titles of those items, and often abstracts explaining the contents of the materials, appear in our online catalog. The catalog information is most often drawn directly from descriptions used by the Library of Congress. It is our estimate that we would have to hire 180 additional staff to complete the task of reviewing all these titles and abstracts and determining whether they could be deemed "indecent" or "patently offensive" to minors by some community standard, at a cost of approximately three million dollars.

33. Carnegie Library adds tens of thousands of new titles to its collections each year. In 1995, for example, we added 38,517 cataloged items and over 46,000 paperbacks, standards, microfiche, maps and other formats to our collections, and, in addition, checked in 26,136 periodicals at our main library and over 24,000 at our branch libraries. If we had to check each table of contents, title, notes and headings (the things that we post online), it would take 1,496 days of work annually. This would require the addition of six full time staff members per year, at a cost of approximately $100,000.

34. In addition, we would have to hire the necessary legal and other staff, or engage outside counsel, to constantly monitor application of and developing legal precedents in connection with the Communica-

tions Decency Act. As prosecutions under the Act are pursued, new evaluations of these millions of our online titles, abstracts and materials would have to be made.

35. As of this time, Carnegie Library offers online 3,000 journals and 1.5 million abstracts. A listing of these items is marked as Plaintiffs' Trial Exhibit 279. Some of these items are also published in hardcopy; some are available only online. These materials are delivered to us online; we do not receive hard copy. These journals and abstracts would have to be reviewed in their entirety by staff to determine if they were, even in part, potentially "indecent" or "patently offensive" for minors. I would need to hire approximately 25 staff, at an annual cost of $ 625,000 to monitor and review these materials for compliance with the Act. We anticipate that a growing number of materials will be provided by the Library online, and that an ever increasing number of journals and other materials will be posted by us in full text. Thus, these costs will almost certainly increase in the future.

36. We have also posted the Rimm study on our sites, the Three Rivers FreeNet. Because of its explicit sexual content, that study would need to be moved to an "adults only" section of our Web site in order to avoid potential liability under the Act. We can tell from our data records that about 176 people a day access that study on our site; about 3,000 people a day—or one million a year—access the Three Rivers FreeNet. In the 32-day period ending March 12, the Rimm study has been available online at our site, people from 76 countries accessed the study, as evidenced by Plaintiffs' Exhibits 277-278.

37. We are spending ten million dollars to install our present technology system, which was custom designed by our technology staff with the assistance of outside commercial consultants. My staff advise me that this system simply could not handle registration of all the individuals (based on our experience thus far) who would annually access our Three Rivers FreeNet.

38. The Three Rivers FreeNet is the only freenet system in the country owned and operated by a library. My experience in working with other freenet systems is that the most frequent activity that renders such systems economically infeasible, and eventually shuts them down, is the exorbitant cost of registering and maintaining all the e-mail addresses of those who use the system. And that simple registration process does not involve the type of identity and age verification the Act contemplates.

39. In our role operating the Three Rivers FreeNet, we assist other local social service organizations in creating and posting their own Web sites on the FreeNet. We provide this service—both our assistance and space on our server—free of charge. We are concerned that our involvement in this activity potentially exposes us to criminal liability if any of the material those individuals include on their sites is found to be "indecent" or "patently offensive" for minors. And it is entirely unclear to us whether the so-called "access defense" would be available to us, especially given our involvement in the process.

40. Many freenets include on their servers local discussion groups on many different topics that permit users to engage in online discussions in "real time." We have not yet added such groups to the Three Rivers FreeNet, but are considering doing so

in the future. However, potential liability for the content of such discussions under the Act gives us grave concern and the outcome of this case will affect whether we add that communications feature to our service.

41. It is my best estimate, based on the information provided by the Library's computer staff and our evaluation of the provisions of this Act, that Carnegie Library would need to add 291 staff members and to allocate approximately $4,795,000 to devise a segregation and identification system that would prevent minors under the age of eighteen from accessing "adults only" information. Obviously, such a system could not be foolproof. Despite elaborate mechanisms to pre-register users of the Internet, we still would be unable to discern, with any degree of certainty, the age of any particular caller. Obviously, the resourceful minor could secure a parent's or other relative's user identification number and still dial in to our system. There is no technology known to us that the library could develop to prevent such circumvention of a user identification system.

42. Carnegie Library of Pittsburgh serves a major metropolitan area. The Library's 1996 operating budget is approximately $ 16 million; our materials budget is currently $1,600,000. We are funded by a regional asset district. Funds are drawn principally from a county sales tax, with supplementation by other city and county taxes. In addition, we obtain gifts and grants. Our budget is used fully to support our current library services. There are no discretionary funds that would cover the costs of the segregation and identification systems and additional staffing discussed above. Our current budget could not be used to finance the type of elaborate segregation and identification systems and staffing necessitated by the Act.

43. I do not believe that Carnegie Library could raise the additional funds to develop and staff an adequate segregation and identification system that would comply with the Act and insulate Carnegie Library from the risk of criminal prosecution. If the Act is not enjoined as unconstitutional, the only alternative would be to remove material from the Internet if there was any potential risk of prosecution. From our perspective, that is an unacceptable alternative. That choice would be counter to our objectives and abhorrent to us as providers of information. Otherwise, Carnegie would have to divert huge amounts of funding from other important library projects. In either case, the library would be reducing the availability of information to its patrons—both adults and minors.

44. Compliance with the Act is economically infeasible for the Carnegie Library. Based on my knowledge and experience, I believe the costs simply could not be borne by smaller libraries with smaller budgets.

I declare under penalty of perjury that the foregoing is true and correct.

Signed this 19 day of March, 1996.

Robert B. Croneberger

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 96-963-M

AMERICAN CIVIL LIBERTIES UNION, ET AL., PLAINTIFFS

v.

JANET RENO, IN HER OFFICIAL CAPACITY AS
ATTORNEY GENERAL OF THE UNITED STATES,
DEFENDANT

Civil Action No. 96-1458

AMERICAN LIBRARY ASSOCIATION, ET AL., PLAINTIFFS

v.

DEPARTMENT OF JUSTICE, ET AL., DEFENDANTS

[Philadelphia, Pennsylvania
April 15, 1996
9:31 o'clock a.m.]

HEARING BEFORE:
THE HONORABLE DOLORES K. SLOVITER
CHIEF JUDGE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

THE HONORABLE RONALD L. BUCKWALTER
THE HONORABLE STEWART DALZELL
UNITED STATES DISTRICT JUDGES

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[Testimony of Dan Olsen]

[25]

* * * * *

Q Well, let me just pick up on Judge Dalzell's question. If U.S. sites were tagged—if U.S. sites tagged their [26] speech using a Minus L18 approach, as you suggested, would it be easier or more difficult for the Surfwatches and other blocking software to search for foreign sites to block?

A Okay, if for example the CDA were upheld and people used tagging or some other mechanism to take

care of that, that means now that the other 60 percent, using your 40 percent figure, the other 60 percent is now no longer of interest to Surfwatch and Netnanny and they can now concentrate on the 40 percent, which is a smaller problem.

Q And based on your knowledge and experience of the Internet do you believe that the U.S. sets a leadership role on standard setting that would influence the behavior of foreign speech providers on the Net?

A In a technical sense, yes, most of the standards that exist on the Internet were begun in the U.S. Some of them, for example the Worldwide Web, began elsewhere, but generally the U.S. has a leadership role technically.

* * * * *

[31]

Q In your opinion, Dr. Olsen, is there any technical problem with other types of third-party registration services catering to non-pornographic sites arising on the Internet?

A Yes. If Mr. Hansen's clients didn't like that particular neighborhood they could form their own version of Adultcheck and have a nicer neighborhood.

[32]

Q Your testimony is that there is not a technical problem?

A There is not a technical problem, they could do exactly what Adultcheck did.

* * * * *

1. Section 509 of the Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 137, provides:

SEC. 509. ONLINE FAMILY EMPOWERMENT.

Title II of the Communications Act of 1934 (47 U.S.C. 201 et seq.) is amended by adding at the end the following new section:

"SEC. 230. PROTECTION FOR PRIVATE BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.

"(a) FINDINGS.—The Congress finds the following:

"(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

"(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

"(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

"(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

"(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

"(b) POLICY.—It is the policy of the United States—

"(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

"(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

"(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

"(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

"(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

"(c) PROTECTION FOR 'GOOD SAMARITAN' BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.—

"(1) TREATMENT OF PUBLISHER OR SPEAKER.—No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

"(2) CIVIL LIABILITY.—No provider or user of an interactive computer service shall be held liable on account of—

"(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

"(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

"(d) EFFECT ON OTHER LAWS.—

"(1) NO EFFECT ON CRIMINAL LAW.—Nothing in this section shall be construed to impair the enforcement of section 223 of this Act, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, United States Code, or any other Federal criminal statute.

"(2) NO EFFECT ON INTELLECTUAL PROPERTY LAW.—Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

"(3) STATE LAW.—Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

"(4) NO EFFECT ON COMMUNICATIONS PRIVACY LAW.—Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

"(e) DEFINITIONS.—As used in this section:

"(1) INTERNET.—The term 'Internet' means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

"(2) INTERACTIVE COMPUTER SERVICE.—The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

"(3) INFORMATION CONTENT PROVIDER.—The term 'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

"(4) ACCESS SOFTWARE PROVIDER.—The term 'access software provider' means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

"(A) filter, screen, allow, or disallow content;

"(B) pick, choose, analyze, or digest content; or

"(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.".

2. Section 561 of the Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 142, provides:

SEC. 561. EXPEDITED REVIEW.

(a) THREE-JUDGE DISTRICT COURT HEARING.—Notwithstanding any other provision of law, any civil action challenging the constitutionality, on its face, of this title or any amendment made by this title, or any provision thereof, shall be heard by a district court of 3 judges convened pursuant to the provisions of section 2284 of title 28, United States Code.

(b) APPELLATE REVIEW.—Notwithstanding any other provision of law, an interlocutory or final judgment, decree, or order of the court of 3 judges in an action under subsection (a) holding this title or an amendment made by this title, or any provision thereof, unconstitutional shall be reviewable as a matter of right by direct appeal to the Supreme Court. Any such appeal shall be filed not more than 20 days after entry of such judgment, decree, or order.

Supreme Court of the United States

No. 96-511

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., APPELLANTS

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

APPEAL from the United States District Court for the Eastern District of Pennsylvania.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

December 6, 1996

Supreme Court, U.S.
FILED
JAN 21 1997
CLERK

No. 96-511

In the Supreme Court of the United States

OCTOBER TERM, 1996

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., APPELLANTS

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE APPELLANTS

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QUESTIONS PRESENTED

1. Whether the federal criminal prohibition against the use of a "telecommunications device" to "knowingly * * * make[ ], create[ ], or solicit[ ], and * * * initiate[ ] the transmission of" any material "which is * * * indecent, knowing that the recipient of the communication is under 18 years of age," 47 U.S.C. 223(a)(1)(B), is unconstitutional on its face.

2. Whether the federal criminal prohibition against "knowingly" using an "interactive computer service" to send to "a specific person or persons under 18 years of age," any material "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs," 47 U.S.C. 223(d)(1)(A), is unconstitutional on its face.

3. Whether the federal criminal prohibition against "knowingly" using an "interactive computer service" to "display in a manner available to a person under 18 years of age," any material "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs," 47 U.S.C. 223(d)(1)(B), is unconstitutional on its face.

4. Whether the federal criminal provisions that forbid a person from knowingly permitting the use of a telecommunications device under such person's control to be used to violate any of the three preceding prohibitions, 47 U.S.C. 223(a)(2) and (d)(2), are unconstitutional on their face.

PARTIES TO THE PROCEEDINGS

Appellants are Janet Reno, the Attorney General of the United States, and the United States Department of Justice. Appellees are the American Civil Liberties Union, Human Rights Watch, Electronic Privacy Information Center, Electronic Frontier Foundation, Journalism Education Association, Computer Professionals for Social Responsibility, National Writers Union, Clarinet Communications Corp., Institute for Global Communications, Stop Prisoner Rape, AIDS Education Global Information System, Bibliobytes, Queer Resources Directory, Critical Path AIDS Project, Inc., Wildcat Press, Inc., Declan McCullagh d/b/a Justice on Campus, Brock Meeks d/b/a Cyberwire Dispatch, John Troyer d/b/a The Safer Sex Page, Jonathan Wallace d/b/a The Ethical Spectacle, Planned Parenthood Federation of America, Inc., American Library Association, Inc., America Online, Inc., American Booksellers Association, Inc., American Booksellers Foundation for Free Expression, American Society of Newpaper Editors, Apple Computer, Inc., Association of American Publishers, Inc., Association of Publishers, Editors and Writers, Citizens Internet Empowerment Coalition, Commercial Internet Exchange Association, CompuServe Incorporated, Families Against Internet Censorship, Freedom to Read Foundation, Inc., Health Sciences Libraries Consortium, Hotwired Ventures LLC, Interactive Digital Software Association, Interactive Services Association, Magazine Publishers of America, Microsoft Corporation, The Microsoft Network, L.L.C., National Press Photographers Association, Netcom Online Communications Services, Inc., Newspaper Association of America, Opnet, Inc., Prodigy Services Company, Society of Professional Journalists, and Wired Ventures, Ltd.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-511

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., APPELLANTS

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1a-147a) is reported at 929 F. Supp. 824.

JURISDICTION

The judgment of the district court was entered on June 11, 1996. A notice of appeal was filed on July 1, 1996. J.S. App. 162a-164a. On August 19, 1996, Justice Souter extended the time for filing a jurisdictional statement to and including September 29, 1996; the jurisdictional statement was filed on September 30, 1996 (a Monday). This Court noted probable jurisdiction on December 6, 1996. The jurisdiction of this Court rests on Section 561(b) of the Communications Decency Act of 1996 (CDA), Pub. L. No. 104-104, 110 Stat. 143, and 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides that "Congress shall make no law * * * abridging the freedom of speech." The Fifth Amendment provides that no person shall be deprived of * * * liberty * * * without due process of law." Section 502 of the Communications Decency Act of 1996 (CDA), Pub. L. No. 104-104, 110 Stat. 133, appears in the appendix to the jurisdictional statement. J.S. App. 165a-172a. Sections 509 and 561 of the CDA appear in the joint appendix. J.A. 169-173.

STATEMENT

This case involves a constitutional challenge to provisions of the Communications Decency Act of 1996 (CDA) that forbid the use of "telecommunications device[s]" and "interactive computer service[s]" to disseminate "indecent" or "patently offensive" sexually explicit material to children under 18 years of age. Pub. L. No. 104-104, § 502, 110 Stat. 133 (1996) (to be codified at 47 U.S.C. 223(a)(1)(B), (a)(2), and (d)).[1] Those prohibitions apply to the dissemination of material on the system of interlinked computers known as the Internet. Appellees, organizations and individuals who use the Internet, filed suit in the United States District Court for the Eastern District of Pennsylvania, alleging that the CDA's restrictions on the dissemination of sexually explicit material violate the First and Fifth Amendments of the Constitution. A three-judge district court held the CDA's restrictions unconstitutional on their face and issued a preliminary injunction against their enforcement. All three judges concluded that the restrictions violate the First Amendment

[1] Unless otherwise noted, references to the CDA are to its provisions as they will be codified in the United States Code.

right of adults to disseminate sexually explicit material to other adults. Two of the three judges concluded that the CDA's restrictions are also unconstitutionally vague.

1. The Internet is generally regarded as having originated from experimental efforts of the Department of Defense to link defense-related computer systems so that research and communication could continue even if portions of the network were damaged. J.S. App. 14a. Similar networks were subsequently developed to link universities, research facilities, businesses, and individuals around the world. *Id.* at 16a. All of those networks were ultimately linked to one another, and became a global network known as the Internet. *Ibid.*

Individuals obtain access to the Internet in two basic ways: Some use a personal computer with a modem to connect over a telephone line to a computer network that is linked to the Internet; others use a computer that is directly connected to a network linked to the Internet. J.S. App. 16a-17a. Many entities offer modem or direct connections to the Internet. For example, national on-line commercial services, such as America Online, and commercial "Internet service providers" charge subscribers a monthly or hourly fee for access to the Internet through their own computer networks. *Id.* at 19a. Educational institutions often provide Internet access to students, faculty and researchers through computers located on campus. *Id.* at 17a. Some businesses provide such access to their employees through their office computers. *Id.* at 17a-18a. As many as 40 million people use the Internet today, and that figure is expected to grow to 200 million by 1999. *Id.* at 13a.

There are many ways for people to communicate on the Internet, either to one or several specific individuals or more broadly. One way is through electronic mail (e-mail). Using e-mail, an individual can send an electronic message

to one or more specific persons. J.S. App. 21a. People can also use automatic mailing list services (mail exploders) to send messages that are automatically distributed via e-mail to those who have subscribed to the mailing list. *Id.* at 22a. Information can also be exchanged through newsgroups. *Id.* at 22a-23a. Like mail exploders, newsgroups involve discussions on specific topics. Those who use newsgroups, however, do not have to subscribe in advance; instead, messages are temporarily stored on the system, and users can obtain access to them until they are purged. *Id.* at 23a. Persons can also use the Internet to communicate in "real time." Programs such as "talk" permit one-to-one communication; programs such as "Internet Relay Chat" permit communication among several persons. *Id.* at 24a.

Another way to use the Internet is to search for and retrieve information that is stored on remote computers. J.S. App. 25a. The most well-known method of doing that is by exploring the "World Wide Web." *Id.* at 25a-26a. The Web utilizes a formatting language known as hypertext markup language (HTML). Software programs known as "Web browsers" can display HTML documents containing text, images, and sound. *Ibid.* HTML also permits documents to include "links" to other Internet documents, so that with a click of a computer "mouse," a person can move from one document to another even if the documents are stored on computers in different parts of the world. *Ibid.* Many organizations have "home pages" on the Web that store information about the organization and its activities and that provide links to other Web sites containing related information. *Id.* at 27a. For example, the Department of Justice maintains a home page on the Web at http://www.usdoj.gov. By typing that Internet address into a Web browser, a user could reach a computer containing information about the activities and operations of the Department of Justice.

"[S]earch engines" allow persons to search for information on a particular topic by typing "key words." J.S. App. 30a. For example, "a Web user looking for the text of Supreme Court opinions would type the words 'Supreme Court' into a search engine, and then be presented with a list of World Wide Web sites that contain Supreme Court information." *Ibid.* The user could thereafter "brows[e] through the information on each site, until the desired material is found." *Ibid.*

There is a wide range of information available through the Internet. Commercial enterprises maintain Web sites to inform potential customers about their goods and services and to solicit purchases. J.S. App. 43a. Nonprofit organizations make information available on topics of interest to them. *Id.* at 44a. Some libraries have placed their card catalogs online. *Id.* at 42a. Chat rooms and newsgroups provide forums for the discussion of different topics, from Formula 1 racing cars to the Oklahoma City bombing. *Id.* at 42a-43a, 47a-48a. Information that is available on the Internet "is as diverse as human thought." *Id.* at 43a. Sexually explicit material also exists on the Internet, extending "from the modestly titillating to the hardest-core." *Id.* at 47a. "Purveyors of such material take advantage of the same ease of access available to all users of the Internet." *Ibid.*

2. When it enacted the CDA, Congress found that the Internet and other interactive computer services "represent an extraordinary advance in the availability of educational and informational resources," 47 U.S.C. 230(a)(1), as well as "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues of intellectual activity," 47 U.S.C. 230(a)(3). At the same time, Congress recognized that "some of the

information traveling over the Internet is tasteless, offensive, and downright spine-tingling." 141 Cong. Rec. S8345 (daily ed. June 14, 1995) (remarks of Sen. Biden). Congress was concerned that, without "some basic rules of the road," the availability and easy accessibility of sexually explicit materials through the Internet would harm children. 141 Cong. Rec. S8087 (daily ed. June 9, 1995) (remarks of Sen. Exon). See 141 Cong. Rec. S8473 (daily ed. June 15, 1995) (remarks of Sen. Robb). As Senator Exon stated, "[t]he computer is a wonderful device for arranging, storing, and making it relatively easy for anyone to call up information or pictures on any subject they want. That is part of the beauty of the Internet system." 141 Cong. Rec. S8089 (daily ed. June 9, 1995). That same technology, however, allows sexually explicit materials, including "the worst, most vile, [and] most perverse pornography," to be "only a few click-click-clicks away from any child." *Id.* at S8088. See also 141 Cong. Rec. H8293 (daily ed. Aug. 2, 1995) (remarks of Rep. Hyde). Congress sought to ensure that the "brave new world" of interactive computer services would not be "hostile to the innocence of our children." 141 Cong. Rec. S8333-S8334 (daily ed. June 14, 1995) (remarks of Sen. Coats).

Congress learned that commercial pornographers had seized upon the Internet as a profitable source of business. It found that commercial pornographers put "the best and most enticing pictures of whatever they want to sell" on the Internet as "teasers," and those pictures may be viewed "without charge" by "very young children" and "anyone else who wants to see them." 141 Cong. Rec. S8090 (daily ed. June 9, 1995) (remarks of Sen. Exon). Congress found that the only barriers between children and such material were "perfunctory onscreen warnings which inform minors they are on their honor not to look at this," which is "like taking a porn shop and putting it in the bedroom of your children and then saying 'Do not look.'" 141 Cong. Rec. S8332-S8333 (daily ed. June 14, 1995) (remarks of Sen. Coats).

Congress also found that pornography on the Internet was particularly accessible to children, because children have become "the computer experts in our Nation's families." 141 Cong. Rec. S8332 (daily ed. June 14, 1995) (remarks of Sen. Coats); see also *id.* at S8344 (remarks of Sen. Exon). As one of the CDA's most vocal legislative opponents stated, even "[v]ery young children are so adept with computers that they can sit at a keypad in front of a computer screen at home or at school and connect to the outside world through the Internet or some other on-line service." *Id.* at S8341 (remarks of Sen. Leahy). One study presented to Congress estimated that "[o]f the 6.8 million homes with on-line accounts currently available, 35 percent have children under the age of 18." *Id.* at S8333-S8334 (remarks of Sen. Coats).

Congress also learned that the easy accessibility of pornographic material on the Internet was deterring its use by parents who did not wish to risk exposing their children to such material. 141 Cong. Rec. S8339 (daily ed. June 14, 1995) (remarks of Sen. Exon). Congress determined that a legislative response was necessary to ensure that the Internet would be a "family friendly resource" (142 Cong. Rec. S718 (daily ed. Feb. 1, 1996) (remarks of Sen. Exon)) that would be "more frequently used" (141 Cong. Rec. S8339 (daily ed. June 14, 1995) (remarks of Sen. Exon)). Congress wanted to make the Internet "even bigger, and * * * even better, * * * but not for raunchy pornography that would turn most people off." *Id.* at S8339-S8340.

Over a period of approximately one and one-half years, Congress considered a variety of ways to address the problem of childrens' access to sexually explicit material on

the Internet. In the summer of 1994, Senator Exon proposed an extension of the existing prohibitior against "indecent" telephone communications to reach "indecent" communications through "telecommunications device[s]." See 140 Cong. Rec. S9745 (daily ed. July 26, 1994). The Senate Commerce Committee issued a report on that proposal, see S. Rep. No. 367, 103d Cong., 2d Sess. 17, 102 (1994), but Congress did not otherwise act upon it. The following February, Senator Exon reintroduced his proposed legislation as The "Communications Decency Act of 1995" (S. 314, 104th Cong., 1st Sess. (1995), see 141 Cong. Rec. S1920 (daily ed. Feb. 1, 1995)), and he later refined the proposal with two amendments (141 Cong. Rec. S8120 (daily ed. June 9, 1995); 141 Cong. Rec. S8328 (daily ed. June 14, 1995)).

Others in the Senate proposed addressing the problem in different ways, such as by revising existing prohibitions on indecent broadcasting to include the transmission of indecent material using computers, see 141 Cong. Rec. S7922-S7923 (daily ed. June 7, 1995) (remarks of Sen. Grassley), by requiring tagging of indecent computer text or graphics, see 141 Cong. Rec. S8368 (daily ed. June 14, 1995) (remarks of Sen. Inouye), or by soliciting a report from the Attorney General on steps that could be taken to prevent unwanted indecency, see *id.* at S8327-S8328 (remarks of Sen. Leahy). In June 1995, the Senate adopted the Exon proposal. 141 Cong. Rec. S8480 (daily ed. June 15, 1995).

In October 1995, the House adopted a somewhat different approach, approving a prohibition against the "communicat[ion] by computer" of "patently offensive" sexually explicit material. 141 Cong. Rec. H9999 (daily ed. Oct. 12, 1995). A conference between the House and Senate reconciled the two approaches, see S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 187-188 (1996), and in February 1996, the

CDA was ultimately enacted in its current form. That legislation was the product of considerable debate in both houses (see *e.g.*, 141 Cong. Rec. S8087-S8091 (daily ed. June 9, 1995); 141 Cong. Rec. S8327-S8347 (daily ed. June 14, 1995); 141 Cong. Rec. H8468-H8472 (daily ed. Aug. 4, 1995); 142 Cong. Rec. S694-S695, S706, S707, S714-S715, S717-S718, H1165-H1166 (daily ed. Feb. 1, 1996)); hearings before the Senate Judiciary Committee (see *Cyberporn and Children: The Scope of the Problem, the State of the Technology, and the Need for Congressional Action, Hearing Before the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. 1 (1995) (Cyberporn Hearing)); and negotiations among conference participants (see 142 Cong. Rec. H1166 (daily ed. Feb. 1, 1996) (remarks of Rep. Berman)).

3. The CDA contains three primary restrictions on the dissemination of sexually explicit material to children. The first (the transmission provision), imposes criminal penalties on "[w]hoever * * * by means of a telecommunications device knowingly * * * (i) makes, creates, or solicits, and (ii) initiates the transmission of, any * * * communication which is * * * indecent, knowing that the recipient of the communication is under 18 years of age." 47 U.S.C. 223(a)(1)(B). The second (the specific child provision) imposes criminal penalties on any person who uses an "interactive computer service" to "send to a specific person or persons under 18 years of age * * * any * * * communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." 47 U.S.C. 223(d)(1)(A). The third (the display provision) imposes criminal penalties on persons who use an interactive computer service to "display" patently offensive sexual material "in a manner available

to a person under 18 years of age." 47 U.S.C. 223(d)(1)(B).[2] Because a "telecommunications device" includes a modem (J.S. App. 6a-7a n.5), and an "interactive computer service" includes a "service or system that provides access to the Internet" (47 U.S.C. 230(e)(2); 47 U.S.C. 223(h)(2)), all of the CDA's basic prohibitions apply to the dissemination of information over the Internet.[3] Although the transmission provision prohibits "indecent" communications, whereas the specific child and display provisions prohibit "patently offensive" sexually explicit communications, Congress intended for those two formulations to be used interchangeably. S. Conf. Rep. No. 230, *supra*, at 188. In other words, indecent is shorthand for patently offensive sexually explicit communications, and the latter is the definition of the former. J.S. App. 110a.

The CDA establishes a "defense to * * * prosecution" for a person who "has restricted access to such [indecent] communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number." 47 U.S.C. 223(e)(5)(B). A defense to prosecution is also available to those who have "taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors" to their indecent communications. 47 U.S.C. 223(e)(5)(A).

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[2] Congress also added supplemental restrictions (the control provisions) that prohibit persons from "knowingly permit[ting] any telecommunications facility under [their] control to be used for" any activity that violates the three primary restrictions. 47 U.S.C. 223(a)(2) and (d)(2).

[3] The prohibitions addressed to interactive computer services apply to services, other than the Internet, such as bulletin boards. 47 U.S.C. 230(e); see *United States* v. *Thomas*, 74 F.3d 701 (6th Cir.) (discussing bulletin boards), cert. denied, 117 S. Ct. 74 (1996).

4. The day the President signed the CDA into law, appellee American Civil Liberties Union (ACLU), joined by other organizations and individuals, filed suit in the United States District Court for the Eastern District of Pennsylvania against the Attorney General and the Department of Justice to challenge the constitutionality of the CDA's restrictions on indecent and patently offensive communications. J.S. App. 3a. The ACLU appellees alleged that the CDA's restrictions are facially unconstitutional under the First Amendment and the Due Process Clause of the Fifth Amendment. *Id.* at 2a. The district court issued a temporary restraining order (TRO) against enforcement of the Act's restrictions on "indecent" communications, but rejected appellees' request for a TRO against enforcement of the restrictions on "patently offensive" communications. *Id.* at 153a-161a. Appellee American Library Association, the major online service providers (including America Online, Inc., CompuServe, and Prodigy), and various other organizations subsequently filed their own facial constitutional challenge to the same provisions. *Id.* at 4a-5a & n.3.

The two suits were consolidated, and pursuant to Section 561(a) of the CDA, 110 Stat. 142, were heard by a three-judge court. After a hearing, the court granted appellees' motion for a preliminary injunction. J.S. App. 1a-149a. For reasons stated in three separate opinions, the court concluded that appellees had demonstrated "a reasonable probability of eventual success in the litigation" by demonstrating that the CDA's restrictions on indecent communications are "unconstitutional on their face." *Id.* at 62a.

a. All three members of the court concluded that the statutory restrictions on indecent communications violate the First Amendment rights of adults to disseminate sexually explicit material to other adults. In her lead

opinion, Judge Sloviter reasoned that the CDA's restrictions were "subject to strict scrutiny" and could be upheld only if they were "narrowly tailored" to effectuate a "compelling government interest." J.S. App. 67a. Judge Sloviter found that "there is certainly a compelling government interest to shield a substantial number of minors from some of the online material that motivated Congress to enact the CDA." *Id.* at 72a-73a. She concluded, however, that the CDA's restrictions are not narrowly tailored to vindicate that interest. Judge Sloviter premised that conclusion on a determination that "it is either technologically impossible or economically prohibitive" for "many" Internet users to limit their communications to adults. J.S. App. 73a-74a. In particular, she found that "no technology exists which allows those posting on the category of newsgroups, mail exploders or chat rooms to screen for age," *id.* at 74a, and that while "efforts at age verification are technically feasible" on the World Wide Web, "as a practical matter, non-commercial organizations and even many commercial organizations using the Web would find it prohibitively expensive and burdensome to engage in * * * age verification," *ibid.* Judge Sloviter therefore concluded that, for many Internet users, the CDA operates as a "complete ban" on adult-to-adult communication of indecent material, *ibid.*, and she viewed such a ban as unconstitutional under this Court's decision in *Sable Communications of Cal., Inc.* v. *FCC*, 492 U.S. 115 (1989). J.S. App. 74a. Judge Buckwalter concurred in that portion of Judge Sloviter's opinion. *Id.* at 84a.

Judge Dalzell also concluded that the CDA's indecency restrictions violate the First Amendment, but under a different analysis. He reasoned that, because "the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen," J.S. App.

141a, Congress "may not regulate indecency on the Internet at all," *id.* at 131a.

b. Judge Buckwalter and Judge Sloviter further concluded that the CDA's restrictions are unconstitutionally vague. As an initial matter, both judges assumed that the "indecent" communications restricted by Section 223(a) are the same as the "patently offensive" communications restricted by Section 223(d)—both refer to material "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs," 47 U.S.C. 223(d)(1)(B). J.S. App. 64a-65a, 92a-93a. Judge Buckwalter viewed that definition as unconstitutionally vague because it does not expressly restrict the communications that it prohibits to those that are indecent for "the medium of cyberspace" (*id.* at 95a), and because it does not expressly state whether the relevant community standard is a uniform national standard or a local standard that varies depending upon where children receive the information (*id.* at 96a-97a). Judge Sloviter agreed that the terms "'indecent' and 'patently offensive' are inherently vague." *Id.* at 80a.

Like the other two judges, Judge Dalzell determined that the "indecent" and "patently offensive" communications restricted by the CDA are governed by the same definition—speech that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." J.S. App. 110a. He concluded, however, that the terms as so defined are not unconstitutionally vague. He reasoned that the definition "contains a subset of the elements of obscenity" set forth in *Miller* v. *California*, 413 U.S. 15 (1973), that this Court has upheld the *Miller* standard against vagueness challenges, and that "the

omission of parts of that test does not warrant a contrary conclusion." J.S. App. 111a-112a.

c. Based on its conclusion that the CDA's restrictions on indecent communications are facially unconstitutional, the three-judge court entered a preliminary injunction preventing the Attorney General from "enforcing, prosecuting, investigating or reviewing any matter premised upon" the restrictions on the transmission or display of indecent material. J.S. App. 148a-149a.[4]

SUMMARY OF ARGUMENT

I. Parents and their children have a First Amendment right to receive information and acquire knowledge, *Meyer* v. *Nebraska*, 262 U.S. 390, 399-401 (1923), and the Internet has unmatched potential to facilitate that interest. Much of the Internet's potential as an educational and informational resource will be wasted, however, if people are unwilling to avail themselves of its benefits because they do not want their children harmed by exposure to patently offensive sexually explicit material. The government therefore not only has an especially strong interest in protecting children from patently offensive material on the Internet, it has an equally compelling interest in furthering the First Amendment interest of all Americans to use what has become an unparalleled

[4] After the decision in this case, a three-judge court in the Southern District of New York issued its own preliminary injunction against enforcement of the CDA's restrictions on patently offensive communications. *Shea* v. *Reno*, 930 F. Supp. 916 (1996). The *Shea* court rejected the district court's conclusion in this case that the CDA's restrictions are unconstitutionally vague, but agreed with its conclusion that they are unconstitutional under *Sable*. The Attorney General's appeal of that preliminary injunction is also pending before this Court. *Reno* v. *Shea*, No. 96-595 (jurisdictional statement filed Oct. 15, 1996).

educational resource. The Communications Decency Act of 1996 constitutionally advances those interests.

A. The transmission and specific child provisions prohibit the sending of indecent material to children with knowledge that the recipient is under 18. Those provisions are essentially no different from the prohibition on the sale of indecent material to minors upheld in *Ginsberg* v. *New York*, 390 U.S. 629 (1968). Like that prohibition, the transmission and specific child provisions directly prevent the dissemination of indecent material to children without prohibiting adult access to that material. Because there is no First Amendment right to disseminate indecent material to children, the transmission and specific child provisions must be upheld.

B. The display provision is also constitutional. When read together with the defenses to prosecution, the display provision permits persons to post indecent material on the Internet so long as they condition access on the use of credit cards or other adult identification devices, or otherwise employ reasonable, effective, and appropriate measures to ensure that their materials are not available to minors. That approach is constitutional under *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 749 (1978). Just as it was constitutional for the FCC to channel indecent broadcasts to times of the day when children most likely would not be exposed to them, so Congress could channel indecent communications to places on the Internet where children are unlikely to obtain them. Indeed, there is a stronger justification for the display provision than there was for the restriction approved in *Pacifica*. The indecency problem on the Internet is much more pronounced than it is on broadcast stations. And unless steps are taken to restrict the availability of such material to children, many parents may be deterred from bringing the Internet into their homes at all.

City of Renton v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986) and *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976), also support the constitutionality of the display provision. In effect, the display provision operates as an adult "cyberzoning" restriction, very much like the adult theater zoning ordinances upheld in *Renton* and *Young*. Just as the cities of Detroit and Renton could direct adult theaters away from residential neighborhoods, so Congress could direct purveyors of indecent material away from areas of cyberspace that are easily accessible to children.

C. The display provision does not impose a flat ban on indecent communication. Current technology affords significant opportunities for adults to communicate and receive indecent material over the Internet and through other channels. For example, those who post indecent material on Web sites for commercial purposes can ensure that only adults have access to their material by requiring a credit card number or an adult ID. Similarly, operators of noncommercial Web sites can use adult verification services for that purpose. There are also ways to communicate through other Internet applications that would not expose children to indecency. And, as technology evolves, the opportunities for adult-to-adult communication of indecent material will expand even further. The district court's decision, which was premised on its characterization of the display provision as a flat ban on indecent communications, is therefore incorrect.

D. There is no less burdensome way to vindicate the government's vital interests that would work equally well. Congress reasonably determined that commercial software that attempts to screen out indecent information only partially addresses the problem. Such software cannot identify all existing sexually explicit sites; it cannot keep pace with the rapid emergence of numerous new

sexually explicit sites; it places the entire burden on parents; and it is owned by only a small fraction of Americans.

In the short run, the CDA may impose some burdens and costs on adult-to-adult communication of indecent material. Congress constitutionally decided, however, that it is better to place some burdens and costs on those who disseminate patently offensive material through use of a new and rapidly changing technology than it is to leave children unprotected.

II. The district court erred in finding the CDA's restrictions unconstitutionally vague. The restrictions apply only to material that, "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." 47 U.S.C. 223(d)(1). That formulation gives fair warning concerning the great bulk of what is and is not covered.

The CDA's definition of indecency is similar to one of the elements that this Court used to define obscenity in *Miller* v. *California*, 413 U.S. 15 (1973), and to one of the elements that New York used to define material harmful to minors in *Ginsberg*. And it is almost identical to the definition of indecency upheld against a vagueness challenge in *Denver Area Educational Telecommunications Consortium* v. *FCC*, 116 S. Ct. 2374 (1996). Those decisions strongly support the conclusion that the CDA's definition of indecency is not unconstitutionally vague.

The historical meaning of the CDA's indecency definition and the CDA's legislative history indicate that the kind of graphic pictures that appear in soft-porn and hard-core porn magazines almost always would be covered, while material having scientific, educational, or news value almost always would not be covered. There may be borderline cases in which it is difficult to determine on

which side of the line particular material falls. But that does not show that the CDA's definition of indecency is unconstitutionally vague.

III. Even if the display provision were unconstitutional in some of its applications, the district court erred in enjoining enforcement of all three provisions in their entirety. The CDA is governed by a severability clause that makes clear that any invalid provision is severable from the rest. The severability clause also makes clear that if application of particular provisions is invalid in some respects, the CDA should otherwise remain intact.

Under the severability clause, any infirmity in the display provision could not affect the transmission and specific child provisions. Moreover, even assuming the display provision were invalid in some of its applications, the district court had no justification for invalidating the display provision in other respects—*e.g.*, as applied to material displayed for commercial purposes. The constitutionality of that application is not open to serious question.

Because the CDA's restrictions are all facially constitutional, and because any infirmity in those provisions could not justify the district court's sweeping injunction, the district court's judgment should be reversed.

ARGUMENT

I. THE CDA'S INDECENCY RESTRICTIONS CONSTITUTIONALLY ADVANCE THE GOVERNMENT'S INTERESTS IN PROTECTING CHILDREN AND IN ENSURING THAT PERSONS ARE NOT DETERRED FROM USING THE INTERNET AND OTHER INTERACTIVE COMPUTER SERVICES

Congress enacted the Communications Decency Act of 1996 (CDA), Pub. L. No. 104-104, 110 Stat. 133, to protect

children from exposure to sexually explicit material that is now widely disseminated on the Internet. Equally significant, Congress sought to make the Internet a resource that all Americans could use without fear that their children would be exposed to the harmful effects of indecent material. The CDA's restrictions on indecent communications constitutionally advance those interests. They prohibit persons from transmitting indecent material to children, while affording significant opportunities for adults to disseminate indecent material to other adults. Applying the principles that this Court has developed in other contexts, the CDA's restrictions are therefore facially constitutional.

A. This Court Has Developed Several Principles For Evaluating The Constitutionality of Restrictions On Indecent Communications In Various Contexts

This Court has not previously addressed the standards for judging the constitutionality of government restrictions on the communication of indecent material over the Internet or other interactive computer services. This Court has, however, developed principles for assessing restrictions on the dissemination of indecent material in other contexts. Those principles should guide the Court's analysis in this case as well. After identifying the basic principles in this part of the brief, we shall explain in the succeeding parts why the CDA provisions that the district court enjoined are constitutional under those principles.

1. First, because children generally do not possess the same capacity as adults to make informed choices about whether to view indecent material, and because such speech may have deep and harmful effects on children that cannot readily be undone, there is no First Amendment right to distribute indecent material to children. Thus,

government regulation that prohibits the dissemination of indecent material to children, while not prohibiting dissemination to adults, is fully consistent with the First Amendment.

Ginsberg v. *New York*, 390 U.S. 629 (1968), establishes that principle. There, the Court rejected a First Amendment challenge to the constitutionality of a criminal statute that punished the sale to minors of sexually explicit magazines that were "patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors." *Id.* at 633. In sustaining that statute, the Court found it sufficient that the State could rationally conclude that exposure to such material was harmful to minors. *Id.* at 641. As this Court has subsequently explained, *Ginsberg* holds that bookstores and movie theaters "may be prohibited from making indecent material available to children." *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 749 (1978); *id.* at 758 (Powell, J., concurring in part and concurring in the judgment). Such entities may withhold indecent material from children, but still sell it to adults. *Ibid.*

2. Second, when the dissemination of indecency to adults poses a substantial risk that children will be exposed to the material, government may channel the indecent communications so as to minimize the risk of children being exposed. *Pacifica* best illustrates that principle. There, the Court upheld an FCC decision holding that a radio station could be sanctioned for an afternoon broadcast of a comedy routine containing a stream of sexually explicit words. The Court explained that "broadcast media have established a uniquely pervasive presence in the lives of all Americans," 438 U.S. at 748; that "[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the

privacy of the home," *ibid.*; that "prior warnings cannot completely protect the listener or viewer from unexpected program content," *ibid.*; that "broadcasting is uniquely accessible to children," *id.* at 749; that the FCC had not "intended to place an absolute prohibition on the broadcast of [indecent] language, but rather sought to channel it to times of day when children most likely would not be exposed to it," *id.* at 732-733; and that "[a]dults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear these words," *id.* at 750 & n.28.

Similarly, in *Denver Area Educational Telecommunications Consortium* v. *FCC*, 116 S. Ct. 2374 (1996), the Court upheld a provision permitting cable system operators to prohibit patently offensive programming over leased access channels. A plurality of the Court did so on the authority of *Pacifica*, reasoning that cable television poses the same serious and pervasive risk of exposing children to indecent material as broadcast stations. *Id.* at 2386-2388.

3. Third, government may adopt reasonable zoning schemes to address the secondary effects of sexually explicit communications. *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986) and *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976), establish that point. In *City of Renton*, the Court upheld a zoning ordinance that prohibited theaters that show sexually explicit adult movies from locating within 1000 feet of any residential zone, single or multiple family dwelling, church, park, or school. 475 U.S. at 44-45. In *Young*, the Court upheld a zoning ordinance that prohibited movie theaters that show sexually explicit movies from locating within 1000 feet of any similar establishment or within 500 feet of a residential area. 427 U.S. at 52. A majority of the Court agreed on a rationale for those decisions in *City of Renton*. The Court explained that zoning restrictions on

businesses that purvey sexually explicit material are constitutional when they are aimed at the secondary effects of such businesses (such as crime, loss of retail trade, reductions in property values, and reduced quality of urban life), and when they allow for reasonable alternative avenues of communication. 475 U.S. at 47-50. The latter inquiry, moreover, focuses on whether the regulation leaves open alternative locations as a legal matter, not whether sites are currently on the market or are commercially viable. *Id.* at 53-54.

4. Fourth, government generally may not adopt an outright ban on the dissemination of indecent material to adults. *Sable Communications of Cal., Inc.* v. *FCC*, 492 U.S. 115 (1989), illustrates that principle. In that case, the Court held unconstitutional a legal prohibition against any dissemination of indecent telephone messages for commercial purposes (dial-a-porn). Although the Court acknowledged that the government had a "compelling interest" in protecting children from dial-a-porn, *id.* at 126, it rejected the government's argument that a flat ban on such messages was appropriate to vindicate that interest. The Court explained that "the government may not 'reduce the adult population . . . to . . . only what is fit for children.'" *Id.* at 127-128. The Court also emphasized that the FCC had "determined that its credit card, access code, and scrambling rules were a satisfactory solution to the problem of keeping indecent dial-a-porn messages out of the reach of minors," *ibid.*, and that there was no evidence to suggest that reliance on such measures would not protect all but "the most enterprising and disobedient young people," *id.* at 130. Because there was an alternative to a flat ban that would have effectively vindicated the government's interest in protecting children, *Sable* does not resolve whether an outright prohibition is permissible when there is no reasonably effective alternative.

5. Finally, when government restrictions substantially burden or deter adult access to indecent communications, and a significantly less burdensome alternative will satisfy the government's interests equally well, the government must choose the less burdensome alternative. *Denver Area* illuminates that principle. There, the Court held unconstitutional a provision that required cable operators to segregate and block patently offensive sex-related material appearing on leased channels, to unblock the channel within 30 days of a subscriber's written request, and to reblock within 30 days of such a request. 116 S. Ct. at 2390-2391. In invalidating that provision, the Court emphasized its "obvious restrictive effects": the significant delays required subscribers to engage in considerable advance planning; the written notice requirement could deter subscribers who feared release of their identities; and the additional costs and burdens could encourage cable operators to ban programs they might otherwise be inclined to show. *Id.* at 2391. The Court also stressed that Congress had recently adopted an alternative approach for unleased cable channels that was "significantly less restrictive," and the record did not explain how Congress could conclude that its more recent approach would be effective for unleased channels but ineffective for leased channels. *Id.* at 2392.

6. Applying the principles discussed above, the CDA's transmission and specific child provisions are constitutional under the *Ginsberg* principle. The display provision is constitutional under both the *Pacifica* and *Renton* principles. None of the CDA's restrictions operates as a flat ban, and there is no equally effective way to serve the government's vital interests. The CDA's restrictions

therefore do not violate the principles of *Sable* or *Denver Area*.[5]

B. The Transmission And Specific Child Provisions Are Facially Constitutional

1. The transmission provision forbids any person from using a "telecommunications device" to "knowingly * * * make[ ], create[ ], or solicit[ ], and * * * initiate[ ] the transmission of" any "communication which is * * * indecent, *knowing* that the recipient of the communication is under 18 years of age." 47 U.S.C. 223(a)(1)(B) (emphasis added). By its terms, that prohibition applies only in situations in which a person transmits indecent material to another person, knowing that person is under 18. For example, if an adult learned that one of the participants in a chat room was under 18, and then sent a private indecent communication to that individual by e-mail, the transmission provision would be violated.

As that example illustrates, to comply with the transmission provision, persons need not refrain from communicating indecent material to adults; they need only refrain from disseminating such materials to persons they know to be under 18. The transmission provision is therefore precisely tailored to meet the government's interest in shielding children from indecent material. At the same time, the provision does not prohibit communications between adults.

The transmission provision is essentially no different from the prohibition on the sale of indecent material to minors upheld in *Ginsberg*. Like that prohibition, the transmission provision directly prevents the dissemination of indecent material to children without restricting

[5] The supplemental control provisions, 47 U.S.C. 223(a)(2) and (d)(2), are constitutional for the same reasons that the provisions they supplement are constitutional. We therefore do not discuss them further.

adult access to that material. The district court therefore erred in enjoining its enforcement.

2. The same is true of the specific child provision, which prohibits persons from "knowingly * * * us[ing] an interactive computer service to send" patently offensive sexually explicit material "to a specific person or persons under 18 years of age." 47 U.S.C. 223(d)(1)(A). Like the transmission provision, the specific child provision applies only to situations in which a person sends indecent material to someone he knows to be under 18. Because the provision is aimed at messages knowingly directed to minors, it does not prohibit adult-to-adult communications, and the district court erred in enjoining its enforcement.[6]

3. In their responses to our jurisdictional statement, appellees did not contend that the transmission and specific child provisions are facially unconstitutional if construed as we have suggested. Appellees instead contended that those provisions should be construed far more expansively to reach any communication "that might be seen by any minor." ACLU Mot. to Aff. 26. That interpretation, however, reads the "knowledge" requirement out of the transmission provision and the "knowledge" and "specific" requirements out of the specific child provision. Because appellees' interpretation cannot be squared with the text of the provisions, it must be rejected.

[6] Although there is overlap between the transmission and specific child provisions (both cover the use of computers to send indecent material when the computers are linked by modems), there are also some differences in coverage. The transmission provision prohibits the use of a telephone or fax machine to transmit indecent material, while the specific child provision does not. The latter provision prohibits the use of interactive computers that are directly linked to other computers to disseminate indecent material, while the former does not.

Nor do those provisions penalize the sending of an indecent message to a place in cyberspace where minors would have the ability to obtain it (ACLU Mot. to Aff. 26-27). That conduct is addressed by the display provision, which prohibits the use of a computer "to display in a manner available" to children sexually explicit material. 47 U.S.C. 223(d)(1)(B). The transmission and specific child provisions have a narrower scope. Their terms require that the person initiating the indecent communication must *know* that a *specific recipient* of *his* message is under 18.

Appellees contend (ACLU Mot. to Aff. 26) that the knowledge requirement in the specific child provision requires only knowledge that a computer is being used, not knowledge that the specific child receiving the message is under 18 years of age. Under basic principles of statutory construction, however, the knowledge requirement applies to both elements of the offense.

The specific child provision applies to:

> (d) Whoever —
>
> (1) in interstate or foreign communications knowingly—
>
> (A) uses an interactive computer service to send to a specific person or persons under 18 years of age, * * *
>
> * * * * *
>
> any * * * communication, that, in context, depicts or describes in terms patently offensive * * * sexual or excretory activities or organs.

Because the use-of-computer requirement and the under-18 requirement appear in the same clause, and because the knowledge requirement introduces that clause, it is

perfectly natural to read the knowledge requirement as applying to both elements. Moreover, any ambiguity must be resolved by resort to the "presumption" that "a scienter requirement should apply to each of the statutory elements which criminalize otherwise innocent conduct." *United States* v. *X-Citement Video, Inc.*, 115 S. Ct. 464, 467-469, 472 (1994).

The transmission and specific child provisions therefore should be construed in the manner we have suggested. As so construed, they raise no serious constitutional question.

C. The Display Provision Is Facially Constitutional

The display provision prohibits the use of an interactive computer service to "display" indecent material "in a manner available" to those under 18. 47 U.S.C. 223(d)(1)(B). Because information posted in public portions of the Internet, such as the World Wide Web, newsgroups, or chat rooms, may be automatically "available" to children as well as adults, the display provision has the potential to affect adult-to-adult communication. A person has a "defense to a prosecution," however, if he restricts access to indecent materials "by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number," 47 U.S.C. 223(e)(5)(B), or otherwise takes, "in good faith, reasonable, effective, and appropriate actions * * * to restrict or prevent access to minors," 47 U.S.C. 223(e)(5)(A). When read together with the statutory defenses, the display provision therefore permits persons to post indecent material on the Internet so long as they condition access on the use of credit cards or other adult identification devices, or otherwise employ "reasonable, effective, and appropriate" measures to ensure that their materials are not available to minors. In that way, Congress sought to keep sexually explicit mate-

rials on the Internet away from children, while providing significant opportunities for adults who are so inclined to receive such materials.

1. a. The approach Congress enacted is constitutional under *Pacifica*. Like broadcast stations, the Internet is establishing an increasingly "pervasive presence" in the lives of Americans. 438 U.S. at 748. As many as 40 million people in the world use the Internet today, and that figure is expected to grow to 200 million by 1999. J.S. App. 13a. And while precise figures are not available, the district court found that approximately 60% of the host computers linked to the Internet are located in the United States. *Ibid.* Like indecency presented on broadcast stations, indecent material presented over the Internet "confronts the citizen * * * in the privacy of the home." 438 U.S. at 748. Like broadcast stations, the Internet "is uniquely accessible to children." *Id.* at 749. Indeed, as Congress recognized, children have become "the computer experts in our Nation's families." 141 Cong. Rec. S8332 (daily ed. June 14, 1995) (remarks of Sen. Coats). As was true in *Pacifica*, Congress has not attempted to forbid all indecent communications. Just as the FCC sought to channel indecent broadcasts "to times of the day when children most likely would not be exposed to [them]," 438 U.S. at 732-733, so Congress has sought in the CDA to channel indecent communications to places on the Internet where children are unlikely to obtain them. And, as was the case in *Pacifica*, adults who have a desire for indecent material may obtain access to such material in other ways. *Id.* at 750 & n.28. In addition to attending live theater and nightclubs, adults interested in indecent material can purchase tapes, compact discs, books, magazines, videotapes, and CD-ROMs.

Moreover, in important ways, there is a stronger justification for the restriction at issue here than there was

for the one approved in *Pacifica*. Because millions of people disseminate information on the Internet without the intervention of editors, network censors, or market disincentives, the indecency problem on the Internet is much more pronounced than it is on broadcast stations. The record in this case demonstrates the seriousness of the problem. It shows that sexually explicit material, "from the modestly titillating to the hardest-core," J.S. App. 47a, is widely available on the Internet, and that computer-literate children can easily find and retrieve it. The government's expert, Howard A. Schmidt, the director of the Air Force's computer crimes investigations office, testified at length concerning the ease with which sexually explicit materials can be retrieved through the Internet and other interactive computer services. See J.A. 5-8, 12-26, 28-30, 31-33 (¶¶ 7-10, 13-32, 36-37, 38-39). Search terms such as "xxx," J.A. 5-8 (¶¶ 7-10), "xxx sex," J.A. 16-20 (¶¶ 19-23), "adult porn," J.A. 30 (¶ 37), and "porn pictures," J.A. 31 (¶ 38), retrieved long lists of sites containing sexually explicit pictures. Each retrieved site contained links to other equally explicit sites, and access to those sites could be obtained simply by clicking with a computer mouse on the highlighted portion identifying the linked site. See, *e.g.*, J.A. 8, 17-18, 27-28, 34 (¶¶ 10, 21(a), 35, 40). Sexually explicit material can also be accidentally retrieved by search terms that have no necessary sexual connotation, such as "Jasmine," "Sleeping Beauty," and "Little Women." J.A. 26-28 (¶¶ 33-35); DX 13A; 3/22/96 Tr. 26:14-29:21, 35:1-37.18. Schmidt's declaration is accompanied in the record by a notebook which contains printouts of each screen that he described in his declaration. That notebook graphically illustrates the dimensions of the problem.

The widespread availability of sexually explicit material on the Internet and other interactive computer services

has a significance beyond the direct risk posed by such material to the psychological well-being of children.[7] Unless steps are taken to restrict the availability of such material to children, parents and schools may be deterred from permitting children to use interactive computer services. Indeed, many parents may be deterred from bringing the Internet into their homes at all.

The "American people have always regarded education and acquisition of knowledge as matters of supreme importance." *Meyer* v. *Nebraska*, 262 U.S. 390, 400 (1923). That fundamental value reflects "[b]oth the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child." *Plyler* v. *Doe*, 457 U.S. 202, 221 (1982). As a result, parents and their children have a profound interest, protected by the First Amendment, in receiving information and acquiring knowledge. See *Kleindienst* v. *Mandel*, 408 U.S. 753, 763 (1972); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969); *Meyer*, 262 U.S. at 399-401. The Internet has unmatched potential to facilitate that interest.

Much of the Internet's potential as an educational and informational resource will be lost, however, if substantial numbers of people are unwilling to avail themselves of its benefits because they do not want their children exposed to patently offensive material.[8] The result will be to ex-

[7] The harm to children is exacerbated where access to indecent material by children is readily permitted, because of the implied societal approval of the material that accompanies such a regime. See *Ginsberg*, 390 U.S. at 642-643 n.10.

[8] Cyberporn Hearing at 7 (Sen. Grassley) ("Congress must give America's parents a new comfort level in public and commercial computer networks if these are to be transformed from the private preserve of a special class of computer hackers into a widely used communications medium. This necessary transformation will never happen if parents abandon the Internet and computer communications technology remains threatening.").

clude those children from an equal opportunity to participate in the promise of our new technological age. The government therefore not only has a compelling interest in protecting children from patently offensive material on the Internet, it also has a compelling interest in protecting the First Amendment interests of all Americans in using what has become an unparalleled educational resource. Under *Pacifica*, the display provision is a constitutional way to further those goals.

b. The district court concluded that *Pacifica* was inapposite, because the danger of inadvertent exposure is not as pronounced on the Internet as it is on broadcast stations. J.S. App. 67a-68a. *Pacifica*, however, depended not on that one factor alone, but on the overall seriousness and pervasiveness of the problem, and the ineffectiveness of parental supervision as the solution. Far more serious than the risk of inadvertent exposure is that indecent material has the characteristics of an attractive "nuisance," 438 U.S. at 750, which young children are likely to affirmatively seek out. Because there is a much larger quantity of indecent material on the Internet than on broadcast stations, and because it is even more difficult to monitor what a child views on the Internet than it is to monitor what he or she watches and hears on broadcast stations, the overall problem of childrens' unsupervised exposure to sexually explicit material is much more serious on the Internet. The district court's effort to distinguish *Pacifica* is therefore unpersuasive.

Appellees have suggested (ALA Resp. 11 n.8) that the scarcity of broadcast spectrums justified the result in *Pacifica*. In applying the *Pacifica* rationale to cable television, however, the plurality in *Denver Area* squarely

rejected that characterization of *Pacifica*. The *Denver Area* plurality explained that *Pacifica* rests on the effect of indecent programming on children, not on spectrum scarcity. 116 S. Ct. at 2388. *Pacifica* is therefore directly applicable in the present context and fully supports the constitutionality of the CDA's display provision.

2. This Court's zoning decisions also support the constitutionality of the display provision. In effect, the display provision operates as an adult "cyberzoning" restriction, very much like the adult theater zoning ordinances upheld in *Renton* and *Young*. Just as the cities of Detroit and Renton could constitutionally require adult theaters to locate outside of residential neighborhoods, see 475 U.S. at 46; 427 U.S. at 52, so Congress could permissibly instruct providers of indecent material on the Internet to remove the material "from areas of cyberspace that are easily accessible to children" and to place them in adult cyberspace zones instead. 141 Cong. Rec. S8333 (daily ed. June 14, 1995) (remarks of Sen. Coats).

The zoning restrictions upheld in *Renton* and *Young* were aimed at the secondary effects of indecent communications, and that is also true here. The government's interest in ensuring that parents are not deterred from allowing their children to use the Internet is directly analogous to the concerns about crime, reduced property value, and the quality of urban life that animated the cities in *Renton* and *Young*. In channeling indecent materials to adult areas of cyberspace, the display provision seeks to ensure that the Internet will not become a wasteland visited by a small segment of the population, but will instead thrive and flourish as a gathering place for all Americans. And here, as in *Renton* and *Young*, the government's goal is "not to suppress the expression of unpopular views." *Renton*, 475 U.S. at 48.

The effect of patently offensive sexually explicit materials on children is also properly viewed as a secondary effect. It is true that the harm to children is the consequence of the indecent material and therefore could in a sense be viewed as a primary rather than a secondary effect. Because there is no First Amendment right to disseminate indecent material to children, however, the harmful effect of such materials on children is better understood as a secondary effect of constitutionally protected adult-to-adult communication. Put differently, the government's interest in protecting children from patently offensive sexually explicit depictions and descriptions is as legitimate and unrelated to the suppression of *constitutionally protected* expression as the government's interests in reducing crime, maintaining property values, and preserving the quality of urban life. Thus, as long as a government zoning scheme is justified by the effects of indecent communications on children rather than adults, and leaves open reasonable opportunities for adult-to-adult communication, it is constitutionally permissible. That is the situation here.

D. The Display Provision Does Not Operate As A Flat Ban

The district court concluded that the display provision operates as a flat ban on indecent speech, in violation of the general principle identified in *Sable*. See J.S. App. 73a-74a (Sloviter, J.), 84a (Buckwalter, J.). That conclusion was premised on a determination that the statutory defenses are not available as a practical matter to most providers of material over the Internet and that such providers would therefore have to eliminate indecent speech entirely from their communications in order to comply with the display provision. The record demonstrates, however, that the CDA's display provision (in conjunction with the statu-

tory defenses) leaves open significant opportunities for adult-to-adult communication. That provision therefore cannot reasonably be viewed as a flat ban.

1. a. First, it is clear that those who post patently offensive sexually explicit material on their Web sites for commercial purposes can take advantage of the statutory defenses. The district court below specifically found that current technology permits the operator of a Web site to screen those who seek access to the site by requesting a credit card number or adult ID. J.S. App. 51a. Moreover, the record in this case demonstrates that many commercial sites that display sexually explicit content already use credit card and other adult verification devices to screen for age. *Id.* at 135a (Dalzell, J.); see also *Shea* v. *Reno*, 930 F. Supp. 916, 943 (S.D.N.Y. 1996) (noting that "[m]any commercial content providers charge a fee to permit a user to gain access to sexually explicit content, thus necessitating credit card verification in any event"); J.A. 12, 18-19 (¶¶ 12, 22); Schmidt Exhs. 3, 22, 29, 31 (examples of Web sites that provide access to sexually explicit material only upon the presentation or use of a valid credit card or a valid account with "First Virtual," a company that provides Internet users with a personal identification number once they provide valid credit card information). It is therefore beyond dispute that commercial providers have the ability to post indecent information on the Internet and limit access to that material to adults.[9]

[9] Commercial providers of indecent information on multi-user computer servers that are not connected to the Internet—such as electronic bulletin boards—can also screen for age, since passwords are ordinarily required to gain access to such a service, and proof of age (or a valid credit card number) can be requested before a password is conferred upon a user. J.A. 30 (¶ 37(a)); Schmidt Exh. 40, at 2 (bulletin board conditioning access on provision of copy of driver's license or birth certificate). See also *United States* v. *Thomas*, 74 F.3d 701, 705 (6th Cir.) (describing operation of sexually explicit electronic bulletin board that limited access to members who had provided names, ages, addresses, phone numbers, and signatures), cert. denied, 117 S. Ct. 74 (1996).

Even though many commercial providers already require a credit card or adult ID for *purchase* of their material, the CDA nonetheless serves an important function. As Congress was aware, commercial providers often post free "teasers" on their Web sites, "not unlike coming attractions [at] the movies," to promote their products. 141 Cong. Rec. S8090 (daily ed. June 9, 1995) (remarks of Sen. Exon). "[T]hey * * * take the best and most enticing pictures of whatever they want to sell that particular day or that particular week and enter it * * * on the Internet," *ibid.*, in order to entice consumers to purchase other similar material. If the CDA's display provision were upheld, commercial pornographers would quickly end that practice.

There is nothing constitutionally suspect about requiring commercial Web site operators who profit from indecent material, but do not currently use credit cards or adult IDs as screening devices, to shoulder the modest burdens associated with their use. Nor does the First Amendment even arguably preclude government from requiring commercial providers who profit from credit card sales to use those same cards to ensure that only adults obtain access to their sites. The constitutionality of applying the CDA's display provision to commercial providers is therefore not open to serious question. *Shea*, 930 F. Supp. at 942-943 (the credit card and adult ID safe harbor "serves as an adequate defense for at least certain commercial providers of Web content—specifically, those who primarily make Web content available for 'purchase' or, put another way, those who charge Web users to gain

access to, and view, their content"). At the very least, the district court erred in entering a preliminary injunction barring enforcement of the CDA's provisions against commercial providers, because they have not and cannot make the requisite showing of a likelihood of success on the merits of their constitutional claim. See *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 316-317 (1985).

b. Operators of commercial and noncommercial Web sites can also take advantage of the statutory defenses by using "adult verification services," such as AdultCheck. See J.S. App. 55a-56a. Such services, which maintain their own Web sites, charge persons a nominal yearly fee (such as $9.95) to obtain an adult identification number that can be used to gain access to Web sites registered with the service. When a user goes to a registered site, he enters his adult ID number. If the number is valid, the user is automatically admitted to the site; if the number is invalid, entry to the site is denied. See generally J.A. 8-11(¶ 11); J.A. 88-93 (describing "AdultCheck" service); J.A. 94-99 (describing "Validate" service). Verification services ordinarily do not charge the operator of a Web site a fee; on the contrary, they are often willing to *pay* the Web site operator to refer customers to their service, and will help the operator set up the means for password entry and verification. See generally J.A. 8-11 (¶ 11), 88-99; see also *Shea*, 930 F. Supp. at 934.

The district court discounted the significance of adult verification services because the government's evidence as to their operation was derived primarily from publicly available promotional materials. J.S. App. 55a. But it is undisputed that such services are currently being used by purveyors of sexually explicit material on the Internet, see J.A. 8-11 (¶ 11), 90-91 (listing sites using AdultCheck),

and appellees offered no evidence that the services do not or could not work as advertised.

Appellees have also contended that adult ID services are not an available option for noncommercial Web sites because such services are currently used exclusively by commercial pornographers with whom appellees would prefer not to be associated. ALA Resp. 17. If appellees were to begin to use such existing adult verification services, however, such services would no longer be tainted by an exclusive association with commercial pornographers. In any event, appellees are free to pool their resources to establish their own adult ID service or to hire another entity to provide such a service for them. The adult ID defense is therefore available to noncommercial Web site operators, and the display provision is constitutional as applied to them.

c. Those seeking to use other forms of communication over the Internet can also take advantage of the statutory defenses. For example, persons can post messages in a freestanding mailing list, newsgroup, or chat room directing participants to a Web site that is screened for age to view a particular patently offensive message. Anyone visiting the site who wished to respond in the same patently offensive fashion could do so by e-mail. Mail exploder and chat room users who want to disseminate patently offensive material can start a closed mailing list or chat room that has rules limiting participation to adults; newsgroup users who wish to exchange patently offensive material could also set up their own list of servers and screen for age. See *Shea*, 930 F. Supp. at 947-948. Other options may soon be available. For example, since the record was compiled at the preliminary injunction stage of the case, it has become clear that chat rooms, newsgroups, and mailing lists can be established on a Web site, where those who wish to post patently offensive

material can avail themselves of the very same screening technologies that apply to the Web.[10]

d. While the display provision already affords numerous opportunities for adult-to-adult communication of indecency, the rapid development of technology on the Internet is certain to facilitate even more. For example, the technology already exists for "tagging" patently offensive communications in all major Internet applications. See J.A. 56-77, 85-86 (¶¶ 43-111, 134). One way for such a system to operate would be for there to be a consensus on a tag (an identifying code) that indicates that material is being marked for compliance with the CDA's indecency restrictions (similar to the R-rating for movies). *Shea*, 930 F. Supp. at 932-933. Web browsers could then be programmed to recognize and automatically block material that has been tagged, leaving parents and other adults the option to unblock it by means of a device that did not permit ready access by children. In light of the rapid development and innovative capabilities of Internet industry participants, there is every reason to expect that effective tagging and blocking or other technological solutions will be created if the CDA's indecency restrictions are upheld. In the meantime, Congress permissibly decided that it is better to place some burdens and costs on those who disseminate patently offensive material through use of a new and rapidly changing technology than it is to leave children unprotected.

2. Appellees attempt to defend the district court's conclusion that the display provision operates as a flat ban by characterizing it as a finding of fact. ACLU Mot. to Aff.

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[10] *E.g.*, http://www.thepalace.com (chat service); http://www.alamak.com/chat/index.html (creation of chat room through use of a credit card); http://www.lyris.com. (software to create discussions and announcement lists).

18-20. The district court's flat ban determination, however, is based on two serious legal errors. First, in deciding whether a particular defense was effectively unavailable, the district court did not limit its consideration to technical feasibility. It also assessed whether a particular method of compliance would impose costs or burdens. J.S. App. 74a. Such costs and burdens are not irrelevant to the question whether the display provision is constitutional. As previously discussed, where significant costs and burdens are shown and a significantly less burdensome alternative will vindicate the government's interests equally well, the government must choose the less burdensome alternative. *Denver Area*, 116 S. Ct. at 2390-2392. The existence of burdens and costs associated with adult-to-adult communication, however, does not transform a restriction on the place and manner in which speech may be communicated into a flat ban of the kind condemned in *Sable*. Cf. *Renton*, 475 U.S. at 53-54 (increased costs and burdens associated with locating in an adult zone do not convert zoning restriction into a flat ban); *Sable*, 492 U.S. at 125 (constitutional to require message provider "to incur some costs in developing and implementing a system for screening the locale of incoming calls"). The district court erred as a matter of law in believing that it did.

Second, the district court assumed that the display provision should be viewed as a flat ban unless most speakers are able to communicate indecent speech over every possible Internet application. The proper inquiry, however, should be whether, on the whole, that provision leaves open reasonable opportunities to disseminate indecent material. Cf. *Renton*, 475 U.S. at 54 (zoning ordinance must provide reasonable opportunity for adult theaters to operate within the city). Nothing in this Court's First Amendment jurisprudence suggests that a restriction on communicating indecency over a medium should be viewed as a

flat ban unless most people are able to use every possible method of communicating through that medium. Because the display provision leaves open reasonable opportunities for the transmission and receipt of indecent material over the Internet and other interactive computer services (not to mention avenues of communication outside of those new technologies), it is not properly viewed as a flat ban.

E. There Are No Alternatives That Would Be Equally Effective In Advancing The Government's Interests

The only remaining question is whether there is any alternative way to satisfy the government's interests that would be significantly less burdensome but would work equally well. Appellees suggest (ALA Resp. 22-23) that commercial software that attempts to screen out indecent information is such an alternative. While Congress recognized that such software could provide "part of the [a]nswer" to the problem of indecency on the Internet, it reasonably determined that it could not provide "the whole answer." 142 Cong. Rec. S706 (daily ed. Feb. 1, 1996) (remarks of Sen. Grassley). Screening software is only partially effective in screening indecent material, and Congress further determined that it would not be fair for parents to have "the sole responsibility to spend their hard-earned money to ensure that cyberporn does not flood into their homes through their personal computers." Cyberporn Hearing at 2 (Sen. Grassley).

One difficulty is that screening software must be programmed to recognize each of the thousands of sites that may contain indecent material, and "new sites are constantly coming online." J.S. App. 38a. Because indecent material can appear in numerous verbal forms, there can be no guarantee that any particular software program will screen all indecent sites simply by searching for particular words or phrases. It is for that reason that software producers employ persons to search the Internet for indecent sites, see *ibid.*, and charge subscribers significant fees for regular supplements to their lists of blocked sites, *id.* at 39a, 41a. Moreover, screening software is unable to "screen for sexually explicit images unaccompanied by suggestive text unless those who configure the software are aware of the particular site." *Id.* at 42a. As a result, "even where a parent has properly installed screening software and the software is operational * * * it is possible to retrieve some sexually explicit material." *Shea*, 930 F. Supp. at 932. Perhaps for that reason, parental control software is used by only a very small percentage of households that have access to the Internet. For example, as of the time of the *Shea* decision, approximately 450 individual households subscribed to SurfWatch, one of the leading commercial screeners of indecency. *Ibid.* Thus, despite the district court's prediction that parental control software might eventually be a reasonably effective method of screening indecent communication, J.S. App. 42a, the district court did not find that such software is currently effective in serving the government's compelling interests, and it did not rely on the availability of parental control software as a basis for its ruling that the CDA's prohibitions are facially unconstitutional.

Appellees offer two additional alternatives that are even less effective in serving the government's compelling interests. First, appellees propose (ALA Resp. 23) that parents use a screening mechanism that screens out *all* Internet speech that has not been affirmatively identified as appropriate for children by a particular rating service. Because only a very small fraction of Internet sites have been rated by any service, however, that option would force parents to limit dramatically the amount of information to which their children would have access. Appellees' other

alternative is still more draconian—parents could "deny their children the opportunity to participate in the medium." *Ibid.* Far from being less restrictive, the two additional alternatives proposed by appellees would seriously undermine the government's ability to further the substantial First Amendment interests of all parents and children in using what has become an unparalleled tool for communicating and retrieving information.

II. THE CDA'S INDECENCY RESTRICTIONS ARE NOT UNCONSTITUTIONALLY VAGUE

The CDA's indecency restrictions encompass the dissemination of information that, "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." 47 U.S.C. 223(d). That formulation is not unconstitutionally vague.

In *Miller* v. *California*, 413 U.S. 15, 24 (1973), this Court defined what States could regulate as obscenity—namely material that (1) "appeals to the prurient interest," (2) "depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law," and (3) "lacks serious literary, artistic, political, or scientific value." The CDA's definition of patently offensive materials is similar to the second element in that definition. Because *Miller* held that the standard it imposed is not unconstitutionally vague and that States could criminally prosecute persons for violations of that standard, *id.* at 27 & n.10, *Miller* provides powerful support for the conclusion that the CDA's definition of patently offensive materials is not unconstitutionally vague. *Ginsberg* reinforces that conclusion. There, the Court rejected a vagueness challenge to a criminal prohibition on the sale of obscene pictures to minors that included as one element that the material be "patently

offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors." 390 U.S. at 632-633, 643.

Similarly, in *Denver Area*, a four-person plurality of the Court expressly rejected a vagueness challenge to a provision giving cable operators a right to prohibit programming on leased channels "that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." 116 S. Ct. at 2381, 2389-2390. Three other Justices voted to uphold the constitutionality of that provision, thereby implicitly rejecting the vagueness challenge. *Id.* at 2419 (opinion of Thomas, J., concurring in part and dissenting in part). Because the CDA's definition of indecency is almost identical to the definition upheld against a vagueness challenge in *Denver Area*, that decision also provides support for the conclusion that the CDA's restrictions are not unconstitutionally vague.

The *Denver Area* plurality's discussion of the issue demonstrates why the CDA's definition of indecency is not unconstitutionally vague. The plurality explained that the provision giving cable operators a right to bar patently offensive communications aims at "pictures of oral sex, bestiality, and rape * * * and not at scientific or educational programs (at least unless done with a highly unusual lack of concern for viewer reaction)." 116 S. Ct. at 2389-2390. The plurality also noted that "what is 'patently offensive' depends on context (the kind of program on which it appears)" and "degree (not 'an occasional expletive')." *Id.* at 2390.

The legislative history to the CDA shows that Congress intended to confine the CDA's restrictions on indecency in a similar way. The Conference Report states that the determination whether material is patently

offensive "cannot be made without a consideration of the context of the description or depiction at issue," and that "[m]aterial with serious redeeming value" that "is quite obviously intended to edify and educate, not to offend," is not patently offensive. S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 189. The Conference Report also explains that Congress intended to codify the FCC's definition of indecency that was approved in *Pacifica*. *Id.* at 188. In enforcing broadcast indecency rules, the FCC has declined to take enforcement action against a televised program that included candid discussions of teenage sexuality and that used sex organ models to simulate the use of various birth control devices. The Commission explained that "the material presented was clinical or instructional in nature and not presented in a pandering, titillating or vulgar manner." *In re King Broadcasting Co.*, 5 F.C.C. Rcd. 2971 (1990). The FCC has also dismissed a citizen's complaint concerning a radio news story that had broadcasted a recording in which a reputed Mafia figure used an expletive repeatedly in conversation. *Letter to Mr. Peter Branton*, 6 F.C.C. Rcd. 610 (1991), petition for review dismissed, 993 F.2d 906 (D.C. Cir. 1993), cert. denied, 114 S. Ct. 1610 (1994).

Thus, material having scientific, educational, or news value almost always falls outside the CDA's coverage. On the other hand, the kind of sexually explicit pictures that appear in the Schmidt notebook in this case will almost always be covered. Admittedly, there may be borderline cases "in which it is difficult to determine the side of the line on which a particular fact situation falls." *United States* v. *Petrillo*, 332 U.S. 1, 7 (1947). But that is not a "sufficient reason to hold * * * language too ambiguous to define a criminal offense." *Ibid.*

The Constitution requires government to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). Perfect clarity, however, is neither possible nor constitutionally required. *Id.* at 110; *Kolender* v. *Lawson*, 461 U.S. 352, 361 (1983). In light of their history, the terms "patently offensive" and "sexual or excretory activities or organs" give fair warning concerning what types of depictions and communications are and are not prohibited by the CDA. If the legislature is to be permitted to protect children by regulating the dissemination of patently offensive communications, no greater precision can be expected or required.

III. THE PRELIMINARY INJUNCTION ENTERED BY THE DISTRICT COURT WAS IN ANY EVENT FAR TOO BROAD IN SCOPE

Finally, even if the display provision were unconstitutional in some of its applications, the district court erred in enjoining enforcement of all three provisions at issue in their entirety. The CDA's indecency restrictions were each enacted as amendments to the Communications Act of 1934. Communications Decency Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 133. They are therefore governed by the severability clause contained in that Act, which provides that "[i]f any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to other persons or circumstances shall not be affected thereby." 47 U.S.C. 608. See *Leavitt* v. *Jane L.*, 116 S. Ct. 2068, 2070 (1996) (relying on severability clause in the underlying Act to which the challenged provisions were added). As this Court has noted, Section 608 "indicate[s] in the strongest possible language that any invalid provision [is] severable from the rest of the Act." *Pacifica*, 438 U.S. at 739 n.13. As a result, any

infirmity in the display prohibition would not affect the transmission and specific child provisions. Indeed, quite apart from the severability provision, in light of Congress's basic objective of protecting children, it simply is not possible that Congress would have preferred no provisions at all to the two provisions standing by themselves. Cf. *Denver Area*, 116 S. Ct. at 2397.

Section 608 is significant in another respect. Under that clause, any determination that the display provision is invalid as applied to particular persons or specific circumstances shall not affect its application "to other persons or circumstances." 47 U.S.C. 608; see *Wyoming* v. *Oklahoma*, 502 U.S. 437, 460-461 & n.14 (1992). To take the clearest example, even assuming that the display provision would have some invalid applications, there would be no basis for invalidating the provision as applied to commercial Web sites. See also *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 503-504 (1985) (unless there are "countervailing considerations," a statute should "be declared invalid to the extent it reaches too far, but otherwise left intact"); compare *United States* v. *National Treasury Employees Union*, 115 S. Ct. 1003, 1019 & n.26 (1995) (refusing to preserve certain applications after finding an act of Congress unconstitutionally overbroad, because Congress had sent conflicting signals as to where the new line should be drawn, each of the new lines would raise independent constitutional concerns, and there was no severability clause).

Contrary to appellees' understanding (ALA Resp. 16; ACLU Mot. to Aff. 24-25), our argument on this point is not that the district court should have construed the CDA's display provision to reach only commercial providers; nor do we argue that the district court should have rewritten the statutory prohibition. Instead, consistent with the statutory command in the applicable severability

clause, the district court was required to limit its preliminary injunctive relief to those applications for which it found that appellees had made the requisite showing of probable unconstitutionality, and to leave intact the rest.

Despite its apparent agreement that the display provision could be applied constitutionally to commercial providers, the district court refused to leave that part of the prohibition intact, on the ground that Congress made a conscious decision to impose the CDA's restrictions on commercial and noncommercial providers alike. J.S. App. 75a-76a; see S. Conf. Rep. No. 230, *supra*, at 191. But that does not provide any basis for ignoring the express terms of the severability clause. Moreover, Congress included noncommercial providers of patently offensive material because it found "that there is a great deal of [such] material on the Internet available to anyone free of charge." 141 Cong. Rec. S8089 (daily ed. June 9, 1995) (remarks of Sen. Exon). That concern does not suggest that Congress would have wanted commercial purveyors of indecency to proceed with impunity if a court were to hold that regulation of some noncommercial providers lay beyond its powers. In fact, the supporters of the CDA repeatedly emphasized that the Act would govern the activities of "entrepreneurs who are seeking money, cash money-making opportunities." *Id.* at S8090 (daily ed. June 9, 1995) (remarks of Sen. Exon); 141 Cong. Rec. S8340 (daily ed. June 14, 1995) ("the moneymakers on pornography"); *id.* at S8333 (remarks of Sen. Coats) (those "in the business of providing [patently offensive] material"). That history leaves little doubt that if the display provision cannot be given effect in all of its applications at the present time, Congress at least would have wanted the restrictions to apply to the display of indecent material "for commercial purposes," see 47 U.S.C. 223(b) (prohibiting

indecent telephone communications "for commercial purposes").

As we have explained in Points I and II of the brief, however, the CDA provisions that appellees challenge are constitutional on their face in the context of all significant categories of communication functions now undertaken on the Internet. The three-judge district court therefore erred in entering a preliminary injunction barring enforcement of those provisions in any respect, especially in this action brought pursuant to a statutory provision that provides for expedited review only of a challenge to the constitutionality of a provision of the CDA "on its face." Pub. L. No. 104-104, § 561(a), 110 Stat. 143.

CONCLUSION

The judgment of the three-judge district court should be reversed.

Respectfully submitted.

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JANUARY 1997

(14)

No. 96-511

Supreme Court, U.S.
FILED
FEB 20 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JANET RENO,
Attorney General of the United States, *et al.*,
Appellants,

v.

AMERICAN CIVIL LIBERTIES UNION, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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BRIEF OF APPELLEES AMERICAN LIBRARY ASSOCIATION, ET AL.

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QUESTIONS PRESENTED

1. Whether the three-judge district court was correct in preliminarily enjoining provisions of the Communications Decency Act of 1996 (the "CDA") that criminalize the sending or displaying of "indecent" or "patently offensive" speech, on the grounds that those provisions violate the First Amendment to the U.S. Constitution, because they effectively ban the communication of constitutionally protected speech among adults, do not directly and substantially further the government's stated interest, and are not narrowly tailored to serve that interest.

2. Whether the three-judge district court was correct in preliminarily enjoining the CDA on the grounds that the terms "indecent" and "patently offensive" "in context," which will be applied to millions of legally unsophisticated speakers engaged in an extraordinarily diverse range of communications in cyberspace, are so vague as to violate the First and Fifth Amendments to the U.S. Constitution.

PARTIES TO THE PROCEEDINGS

Appellants are Janet Reno, the Attorney General of the United States, and the United States Department of Justice. The "ALA Appellees" are American Library Association, Inc., America Online, Inc., American Booksellers Association, Inc., American Booksellers Foundation for Free Expression, American Society of Newspaper Editors, Apple Computer, Inc., Association of American Publishers, Inc., Association of Publishers, Editors and Writers, Citizens Internet Empowerment Coalition, Commercial Internet Exchange Association, CompuServe Incorporated, Families Against Internet Censorship, Freedom to Read Foundation, Inc., Health Sciences Libraries Consortium, Hotwired, Inc., Interactive Digital Software Association, Interactive Services Association, Magazine Publishers of America, Microsoft Corporation, The Microsoft Networks, L.L.C., National Press Photographers Association, Netcom On-line Communications Services, Inc., Newspaper Association of America, Opnet, Inc., Prodigy Services Corp., Society of Professional Journalists, and Wired Ventures, Inc. The "ACLU Appellees" are the American Civil Liberties Union, Human Rights Watch, Electronic Privacy Information Center, Electronic Frontier Foundation, Journalism Education Association, Computer Professionals for Social Responsibility, National Writers Union, Clarinet Communications Corp., Institute for Global Communications, Stop Prisoner Rape, AIDS Education Global Information System, Bibliobytes, Queer Resources Directory, Critical Path AIDS Project, Inc., Wildcat Press, Inc., Declan McCullagh d/b/a Justice on Campus, Brock Meeks d/b/a Cyberwire Dispatch, John Troyer d/b/a The Safer Sex Page, Jonathan Wallace d/b/a The Ethical Spectacle, Planned Parenthood Federation of America, Inc.

Pursuant to this Court's Rule 29.6, the ALA Appellees list the following parent companies and nonwholly owned subsidiaries of the corporate parties among them: Digital

Marketing Services, Inc., H & R Block, Inc., International Wireless, Inc., Prodigy, Inc., Netcom Canada, Inc., and SonicNet, Inc.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

No. 96-511

JANET RENO,
Attorney General of the United States, *et al.*,
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v.
AMERICAN CIVIL LIBERTIES UNION, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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BRIEF OF APPELLEES AMERICAN LIBRARY ASSOCIATION, ET AL.

STATEMENT

Until very recently, the mass media have consisted of a limited number of privileged speakers communicating to essentially passive audiences. The communications medium of the twenty-first century—the Internet—is changing that. It allows millions of average individuals to communicate to and with millions of other individuals on a global scale never before possible, and to gain access to a vast amount of information originating world-wide.

The Communications Decency Act of 1996 (the "CDA" or "Act")[1] criminalizes a broad range of constitutionally

[1] The CDA was enacted as Title V of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (1996) (to be codified at 47 U.S.C. § 223(a) to (h)). References are to the provisions as they will be codified.

protected, but "indecent" or "patently offensive," communications on the Internet if they are sent or made "available" to minors.[2] The Act's prohibition is tempered only by affirmative defenses, which the three-judge district court found cannot be used by the vast majority of Internet speakers. The CDA thus operates as a *ban* on most "indecent" speech in "cyberspace," and reduces the adult population to reading and viewing only what is appropriate for children.

1. The Statutory Provisions at Issue. The provision of the CDA principally at issue here, 47 U.S.C. § 223 (d)(1)(B), makes it a felony, punishable by up to two years in prison and a fine, to use an "interactive computer service to display in a manner available to a person under 18 years of age," any communication that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." Other sections criminalize the use of an "interactive computer service to send to a specific person or persons under 18 years of age" any such "patently offensive" material (§ 223(d)(1)(A)), and the use of a "telecommunications device" to make or create and "initiate[] the transmission of any . . . communication which is . . . indecent, knowing that the recipient of the communication is under 18 years of age." *Id.* § 223(a)(1)(B)(ii).

The "indecent" and "patently offensive" standards are not further defined in the Act. The Conferees used the terms interchangeably and indicated they intended to adopt the broadcast standard utilized by the Federal Communications Commission ("FCC") that was discussed in *FCC*

[2] Appellees did not challenge the Act's application to obscenity, child pornography, harassment or child solicitation. Most of the examples of online speech relied upon by the sponsors of the CDA (including Senator Exon's so-called "Blue Book") and cited in the briefs of *amici* supporting the Government could be prosecuted under those standards, and the preliminary injunction at issue here does not enjoin those prosecutions. *See* J.S. App. 8a, 149a, 151a.

v. Pacifica Foundation, 438 U.S. 726 (1978). S. Conf. Rep. No. 104-230, at 188 (1996) ("Conf. Rep.").

Congress enacted two affirmative defenses relevant here. First, it is a defense if the speaker "has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in [the Act], which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology." 47 U.S.C. § 223(e)(5)(A).[3] The second defense applies to a speaker who "has restricted access . . . by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number." *Id.* § 223(e)(5)(B).

2. Appellees. Appellees include individuals, libraries, small non-profit organizations, educational societies, and bookstores, as well as the world's largest providers of access to the Internet.[4] All of their speech is appropriate and constitutionally protected for adults. The vast majority, if not all, is appropriate for most minors as well. *None* is the kind of "pornography" the Government contends is the focus of the Act. Nevertheless, Appellees engage in or provide access to speech that, in some communities, could be considered "indecent" or "patently offensive," such as information about sexual issues and problems, images and text that depict sexually oriented subjects, and discourse and debate that contain the "seven dirty words" at issue in *Pacifica*.[5]

[3] Although the FCC is permitted to opine as to what measures might qualify under this defense, compliance with FCC guidelines does not preclude prosecution or conviction. *Id.* § 223(e)(6). At any rate, the FCC has not specified *any* measures that, in its view, should be regarded even as evidence of "good faith."

[4] A full listing of Appellees in these two consolidated cases appears at p. ii *supra*.

[5] For illustrations of Appellees' speech *see* Point I *infra*, the Statement of the Case of the ACLU Appellees, and paragraphs 70

3. Proceedings Below. The three-judge district court conducted a five-day evidentiary hearing, during which it received extensive expert testimony (including a demonstration of how the Internet and parental control options work) and voluminous documentary evidence (including scores of affidavits and 356 stipulated facts). Based on that evidence, the court unanimously held that the Act violates the First Amendment because it effectively bans constitutionally protected speech among adults, would not directly and materially further the Government's interest in preventing minors from gaining access to indecent online speech, and is not the least restrictive means available to serve that interest. J.S. App. 67a-83a (Sloviter, C.J.), 86a-87a (Buckwalter, J.), 102a-147a (Dalzell, J.). Two judges also concluded that the terms "indecent" and "patently offensive" are unconstitutionally vague. *Id.* at 80a (Sloviter, C.J.), 84a-85a (Buckwalter, J.).

The district court made extensive factual findings to support its legal conclusions. *See* J.S. App. 11a-61a. The findings focused on the nature of the Internet (*id.* at 12a-20a), the different ways of communicating in cyberspace (*id.* at 21a-42a), the nature and content of online speech (*id.* at 42a-52a), and the inability of most speakers to use the CDA's affirmative defenses (*id.* at 52a-61a).

Specifically, the court found that anyone with access to the Internet can use it to exchange ideas, research, poetry, images, or literature, on a global basis, virtually instantaneously. J.S. App. 13a-14a. Worldwide, almost ten million host computers are linked to the Internet (of which 40 percent or more are located outside the United States), and the number of Internet users is predicted to grow from over 40 million today to 200 million by 1999. *Id.* at 13a, 59a. Most American homes gain access to the Internet through major "online service providers" such as Appellees America Online, CompuServe,

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through 356 of the parties' stipulation of facts (adopted as findings of the district court, J.S. App. 12a n.9).

the Microsoft Network, and Prodigy. *Id.* at 19a. At the time of trial, the major online service providers had about twelve million individual subscribers across the United States. *Id.* at 19a-20a. *See also id.* at 17a-19a (noting other means of gaining access).

The court also found that the Internet comprises quite different methods of communication. *Id.* at 21a. The simplest method, "e-mail," allows an individual to transmit a message to a specific individual or individuals. *Id.* at 21a-22a. Additionally, the Internet includes thousands of automatic mailing list services (called "listservs" or "mail exploders"), which allow subscribers to transmit messages on a given topic and have those messages automatically forwarded (via e-mail) to every other subscriber. *Id.* at 22a.

"Newsgroups" are open forums for discussing particular topics. J.S. App. 23a. A message "posted" to a newsgroup is automatically forwarded to all computers that provide access to that newsgroup. *Id.* There are newsgroups on more than 15,000 subjects. *Id.* at 24a. Each day, approximately 100,000 new messages are posted to newsgroups and are distributed to approximately 200,000 computers; individuals can review and reply to those messages at any time. *Id.* at 23a-24a.

"Chat rooms" allow individuals to send messages that almost immediately appear on the computer screens of other individuals participating in that conversation, who can immediately reply. *Id.* at 24a-25a.

Another distinct mode of communication is the "World Wide Web." *Id.* at 25a. Speakers on the Web can display text and graphic information on their "Web sites," and may also include "links" to other information or resources posted by other speakers on computers all around the world. *Id.* at 25a-26a. Using these "hyperlinks," an individual can "click" using a computer mouse and be immediately connected to the resource itself. *Id.* at 26a.

With all of these methods of online communication (except e-mail directed to a specific individual), no information flows to a particular individual unless that individual affirmatively requests the information, and when an individual makes such a request, it is usually clear what type of content will be delivered. J.S. App. 48a-49a. In addition, speakers generally do not know the age or other specific identifying information about the recipients of their speech. *Id.* at 49a-51a.

The district court found that content on the Internet "is as diverse as human thought." J.S. App. 43a. The court recognized that some of that content could be deemed "indecent," but found "[t]here is no evidence that sexually-oriented material is the primary type of content on this new medium." *Id.* at 47a. Moreover, a substantial amount of indecent material is posted abroad. *Id.* at 59a, 145a (Dalzell, J.). And "[f]oreign content is otherwise indistinguishable from domestic content . . . since foreign speech is created, named, and posted in the same manner as domestic speech." *Id.* at 59a.

The court found that parents can protect their children from online content the parents deem inappropriate. J.S. App. 32a-42a. The major online service providers offer parental control options free of charge. *Id.* at 41a-42a. These controls permit parents to block access to the Internet entirely, or to block access to specific modes of communication (such as newsgroups or chat rooms), to all visual images, or to all of the Internet except for areas the service provider has determined are appropriate for children. *Id.*[6] Software, which can be utilized on home computers to enable parents to block or to filter the access of their children to material on the Internet, is also readily available. *Id.* at 32a-35a. These "user-based" parental control options block or screen speech regardless of whether it is posted domestically or abroad. Duvall

[6] *See* Burrington Test., Tr. Vol. III, at 43:8-14.

Test., Dec. ¶ 41, Jt. App. 104-105; Duvall Test., Tr. Vol. I, 161:17-162:18, Jt. App. 106-107.

The district court found as fact that, for *most* methods of communication over the Internet, including newsgroups, listservs and chat rooms, *it is not technologically possible* for a *speaker* to restrict the availability of his or her speech to adults. J.S. App. 47a, 49a. *See also id.* at 50a (noting that the Government's expert agreed).

Indeed, the district court found there is only one mode of communication in cyberspace—the World Wide Web—where it is even technologically possible to screen for age, by using an interactive computer program called a "cgi script." *Id.* at 51a. The court found, however, that speakers who publish on Web sites provided by the major online service providers cannot use cgi scripts. *Id.* For those speakers, there "is no method currently available . . . to screen recipients online for age." *Id.* Moreover, the district court found that even for most Web speakers who have the capability to screen for age, doing so would be "prohibitively expensive." *Id.* at 74a (Sloviter, C.J.) (summarizing factual findings). Thus, the *only* speakers who would have both the technological and practical ability to screen for age are *commercial* speakers who charge money for access to the speech on their Web sites. *Id.* at 61a. But the court found that "[t]he Internet is not exclusively, or even primarily, a means of commercial communication." *Id.* at 43a. To the contrary, its principal use is for expression made available by the speaker free of charge. Accordingly, the district court concluded that "[t]he CDA's defenses . . . are effectively unavailable for non-commercial, not-for-profit entities," so that "[m]any speakers . . . on the Internet must choose between silence and the risk of prosecution." *Id.* at 61a.

Based on its findings, the court preliminarily enjoined enforcement of all three challenged sections of the CDA

as applied to indecent speech. J.S. App. 62a, 148a-152a.[7] The Government appealed and this Court noted probable jurisdiction.

SUMMARY OF ARGUMENT

1. The CDA criminalizes a broad range of constitutionally protected "indecent" speech. The Act covers not only the "commercial" purveyors of "pornography" that are the focus of the Government's argument, but also non-commercial speakers (who constitute the vast majority of all speakers in "cyberspace") as well as non-prurient images and text that have serious value for adults and many minors. Indeed, the Act by its terms applies to the speech of "libraries and educational institutions"—speakers hardly likely to be found selling "pornography."

2. The district court correctly found that the CDA operates as an unconstitutional *ban* of indecent speech among adults in cyberspace. Because of the nature of the Internet, the Act's prohibition on displaying indecent expression in a manner "available" to minors makes it virtually impossible to communicate an indecent message to adults. As this Court has held for forty years, such a ban violates the First Amendment. *See, e.g., Sable Communications v. FCC*, 492 U.S. 115, 126-27 (1989).

The Government nevertheless argues that the CDA's draconian impact on protected speech will be eliminated by the affirmative defenses Congress provided. That argument ignores the district court's detailed factual findings, none of which is challenged here. Based in part on the testimony of the Government's own expert, the district court found that it is *technologically impossible* for speakers to utilize those defenses when they are speaking in all

[7] In a separate challenge, another three-judge district court, relying in part on the record in this case, preliminarily enjoined enforcement of § 223(d)(1)(B). *Shea v. Reno*, 930 F. Supp. 916, 944 (S.D.N.Y. 1996). The Jurisdictional Statement in that case, No. 95-595, is currently pending before this Court.

but one of the modes of communicating in cyberspace. Thus, the Act completely bans all "indecent" speech by users of newsgroups, listservs and chat rooms.

The Government argues that the Act should nevertheless be upheld because speakers using *one* of the modes of communication on the Internet—the World Wide Web—can use the Act's affirmative defenses. But the district court found that many Web sites cannot screen for age, and even where screening is possible it would be prohibitively expensive for speakers other than commercial entities that charge money for access to their speech. The existence of this very limited outlet for indecent expression on the Internet does not make the Act any less of a ban of speech for the vast majority of speakers.

3. The district court also correctly concluded that the CDA is not likely to survive the strict scrutiny such a content-based burden on protected speech requires, because the Act will not directly and materially advance the Government's interest in preventing minors from gaining access to indecent expression, and because there are far more effective alternatives that would impose *no* burden on protected speech. Of all the indecent communications on the Internet, a very large percentage are posted abroad, and there is no speaker-based control government can impose that would prevent those communications from being available to every home that has access to the Internet. Thus, because of the global nature of the Internet, the CDA cannot and will not prevent minors from gaining access to indecent material.

But parents can prevent access by their children. The vast majority of American families connected to the Internet subscribe to one of the major online service providers, which enable parents either to block or to screen selectively their children's access. Other filtering software is also available. If parents exercise parental responsibility, they can prevent their children from accessing indecent communications, including communications posted abroad.

If they do not, no government regulation of speakers can prevent minors from gaining access to indecent communications.

In addition, such "user-based" blocking or screening would have *no* effect on the ability of adults to communicate and to receive constitutionally protected, though indecent, messages and images. By contrast, the "speaker-based" prohibitions of the CDA chill speech among adults and reduce the adult population to reading and viewing only what is suitable for children.

4. The district court also correctly concluded that the CDA is likely to be found unconstitutionally vague. Below, the Government's lawyers and experts could not begin to explain how speakers could determine what speech the CDA criminalizes. The *amicus* brief filed in this Court by the CDA's principal Congressional sponsors dramatically underscores the intractable vagueness of the Act's criminal prohibitions. The brief acknowledges that even material with "truly serious value" could be found criminal if a jury determined, on an *ad hoc* basis, that a "host of" other (named and unnamed) "variables" outweighed the value of the speech.[8] It is hard to imagine a criminal standard that provides less guidance, or to conceive of a speech prohibition that would have a broader chilling effect—particularly given that it must be understood and applied by millions of individual speakers, often speaking spontaneously and without benefit of legal advice.

5. The Government's attempt to salvage two sections of the CDA, §§ 223(a)(1)(B) and 223(d)(1)(A), by redefining their scope, is unavailing. First, even as redefined on appeal, these provisions would apparently have the same unconstitutional impact on speech among adults as the "display" provision. Second, the Government's reliance on *Ginsberg v. New York*, 390 U.S. 629 (1968), is entirely misplaced. Unlike the CDA, the statute at issue in *Ginsberg* prohibited only the *commercial sale* of books deemed "harmful to minors" when the bookseller knew the purchaser was a minor, and it had *no* effect on sales to adults. Third, the Government's redefinition of these provisions does not eliminate their unconstitutional vagueness. Thus, the district court properly enjoined enforcement of all three challenged provisions. But if there is any question about these two, the proper course is to affirm the preliminary injunction and allow the Government to develop its new arguments on remand in opposition to permanent relief.

[8] Br. of *Amici* "Members of Congress" at 13 ("Under the 'online indecency' test, the Government need not affirmatively prove the presence of prurience or lack of serious value.").

6. Finally, the Court should decline the Government's invitation to rewrite the Act, and should leave to Congress the delicate policy judgments any narrowing construction would require. Congress did not fully understand the Internet, or what can and cannot be done in cyberspace, and it is impossible for this Court to discern how Congress would have legislated if it had had the benefit of the comprehensive record compiled in this case. The Internet may prove to be the most important communications medium of the twenty-first century, and any attempts to regulate speech in that medium should be undertaken with the care and precision such a speech-enhancing medium deserves.

ARGUMENT

I. THE CDA CRIMINALIZES A BROAD RANGE OF SPEECH WITH SERIOUS VALUE.

Although the Government's brief focuses almost exclusively on "commercial" purveyors of "pornography" (Gov. Br. 6, 16, 34-36, 46-47), the district court found, and the Act itself makes clear, that the CDA criminalizes a much broader range of speech.

First, unlike the dial-a-porn law upon which the CDA is purportedly modeled, the CDA is *not* expressly limited to "commercial" speakers—those who charge listeners a

fee to obtain their speech.[9] To the contrary, the Conference Report confirms that Congress intended "content regulations of both commercial and non-commercial providers." [10]

Second, the Act also plainly applies to a far wider range of speech than "pornography." It is expressly made applicable to "libraries and educational institutions," 47 U.S.C. § 230(e)(2), and they are certainly not pornographers.

Third, the Act by its terms applies not only to visual "depict[ions]" and "image[s]", but also to textual "comment[s]" and "descri[ptions]." §§ 223(a)(1), 223(d)(1). Indeed, Congress intended to adopt the patent offensiveness standard discussed in *Pacifica*, and *Pacifica* involved only crude language, not pornography. *See* Conf. Rep. at 187-89. Accordingly, the Government's expert acknowledged it is reasonable for speakers to fear that any Internet communication containing some or all of the "seven dirty words" at issue in *Pacifica* may constitute a felony. *See* Olsen Test., Tr. Vol. V, 53:16-54:10.

Fourth, as the district court concluded, the CDA does not exempt speech of serious value. J.S. App. 61a, 76a (Sloviter, C.J.), 98a-99a (Buckwalter, J.), 115a-119a (Dalzell, J.). Congress deliberately rejected the narrower "harmful-to-minors" standard at issue in *Ginsberg v. New York*, 390 U.S. 629 (1968), which does not criminalize speech with serious value (and also exempts patently offensive speech if it is not "prurient"). *See* Conf. Rep. at 189. In enforcing the standard on which the CDA is based, the FCC has expressly declined to hold that "if a

[9] *Compare* 47 U.S.C. § 223(b)(2)(A) (criminalizing indecent telephone communication made "*for commercial purposes*") (emphasis added).

[10] Conf. Rep. at 191. The Government's trial evidence regarding prohibited speech included repeated references to newsgroups, even though speech through newsgroups is not "sold." Senator Exon also referred to newsgroups as a principal target of the legislation. *See* 141 Cong. Rec. S8089 (daily ed. June 9, 1995).

work has merit, it is per se not indecent." *Letter to Merrell Hansen*, 6 F.C.C. Rcd 3689 (1990) (citation omitted).[11] The FCC has ruled that speech may be found "patently offensive" even when it is presented "in the news . . . in a serious, newsworthy manner." *Id.*[12]

Everything from online sex education, medical information, literature, art, music, and politics to everyday discourse may contain content of a sexual or "vulgar" nature. Accordingly, Appellees and their members legitimately fear prosecution precisely because the CDA applies even to speech with serious value. *See* J.S. App. 12a n.9, 116a-119a (Dalzell, J.). The Government's witnesses confirmed the validity of those fears. For example, Howard Schmidt (called as an expert to demonstrate that images subject to the Act could be accessed on the Internet) testified that the publisher of *Vanity Fair* Magazine could be liable under the Act for posting online a nude cover picture of the actress Demi Moore (even though the *print* publication of that same image was entirely lawful). See Schmidt Test., Tr. Vol. IV, 138:23-139:14, Jt. App. 118-119. As the court concluded, based on the evidence and "colloquy with the government attorneys," the CDA "cover[s] a broad range of material from contemporary films, plays and books showing or describing sexual activities . . . to controversial contemporary art and photographs showing sexual organs in positions that the government conceded could be patently offensive in some communities." J.S. App. 76a-77a (Sloviter, C.J.).

[11] *See also Gillett Communications of Atlanta, Inc. v. Becker*, 807 F. Supp. 757 (N.D. Ga. 1992) (holding TV broadcast of political advertisement by a candidate for public office was indecent), *appeal dismissed*, 5 F.3d 1500 (11th Cir. 1993). Indeed, in *Pacifica*, this Court did not suggest that George Carlin's satirical monologue lacked serious value. *See Action For Children's TV v. FCC*, 852 F.2d 1332, 1340 n.13 (D.C. Cir. 1988) (concluding monologue "may be an example of indecent material possessing significant social value").

[12] The Government and its *amici* disagree as to the weight serious value should be given among the "host of variables" to be considered by the jury, which highlights the vagueness of the terms "indecent" and "patently offensive." *See infra* Point IV.

II. THE CDA UNCONSTITUTIONALLY BANS THE DISSEMINATION TO ADULTS OF SPEECH THAT IS "INDECENT" BUT CONSTITUTIONALLY PROTECTED FOR ADULTS.

After careful consideration of an extensive record, the district court unanimously held that the CDA "would effect a complete ban even for adults" of "indecent" but constitutionally protected expression. J.S. App. 74a (Sloviter, C.J.); *see id.* at 84a (Buckwalter, J.), 136a (Dalzell, J.). The Government concedes that, under the First Amendment, "government generally may not adopt an outright ban on the dissemination of indecent material to adults." Gov. Br. at 22 (citing *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989)). It seeks to avoid this principle by narrowing the concept of a "ban" to the point where it becomes meaningless, and rearguing, without evidentiary basis, the facts concerning the actual impact of the CDA.[13] Neither argument has merit.

[13] Although it quarrels with some "facts" found below (and simply ignores the rest), the Government does not claim those findings are "clearly erroneous." Nor does it argue for a less deferential standard of review. Although this Court has held that appellate courts may conduct an "independent review" of the facts in First Amendment cases to assure that free-speech rights have not been unduly abridged through spurious findings of fact, *Bose Corp. v. Consumers Union, Inc.* 466 U.S. 485, 510-11 (1984), that rule does not afford "special protection for the government's claim that it has been wrongly prevented from restricting speech." *Planned Parenthood Ass'n v. Chicago Transit Auth.*, 767 F.2d 1225, 1229 (7th Cir. 1985). Where, as here, the special First Amendment concerns animating the rule are absent, there is no basis to depart from the deferential standard of fact review required by Fed. R. Civ. P. 52(a). In any event, the Government's scattered disagreements with the facts found below are not supported by citations to contrary evidence in the record, and the findings below have overwhelming support in the record.

A. The Government Cannot Constitutionally Ban Indecent Speech From a Medium of Communication Used by Adults in Order to Prevent Children From Seeking Access to That Speech.

This Court has repeatedly held that the goal of protecting children cannot justify the suppression of constitutionally protected but indecent speech in a given medium. As the Court put it last Term in *Denver Area Educ. Tele. Consortium, Inc. v. FCC*, 116 S. Ct. 2374 (1996), even where it is clear that "[n]o provision . . . short of an absolute ban . . . offer[s] certain protection against assault by a determined child," that fact does not justify "'"'reduc[ing] the adult population . . . to . . . only what is fit for children.'"'" *Id.* at 2393 (quoting *Sable*, 492 U.S. at 128, which quoted *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73 (1983), which in turn quoted *Butler v. Michigan*, 352 U.S. 380, 383 (1957)). *See id.* at 2416-17 (Kennedy, J., joined by Ginsburg, J.).[14]

"The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox," and this is so "*regardless* of the strength of the government's interest" in protecting children. *Bolger*, 463 U.S. at 74-75 (emphasis added). Government may not constitutionally "quarantin[e] the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence . . . . Surely this is to burn the house to roast the pig." *Butler*, 352 U.S. at 383. These principles compel the district court's ruling here.

[14] As the cases cited in *Denver Area* demonstrate, this bedrock principle has already been applied in the context of sale or distribution of immoral books and other printed materials (*Butler*), use of the postal service to mail unsolicited commercial advertisements about contraceptives to homes (*Bolger*), and use of the telephone to sell indecent "dial-a-porn" messages (*Sable*).

B. The District Court Found as a Fact That the CDA Operates as a Ban.

In *Sable*, the Court stressed that, even if a law does not expressly ban indecent speech, it is unconstitutional if it has the "*effect* of limiting the content of adult [communications] to that which is suitable for children." 492 U.S. at 131. The CDA, which requires Internet speakers to assure that their indecent expression is not "available" to minors, has precisely such an unconstitutional effect for most speakers and most modes of communication, because there is no way to satisfy that requirement other than by refraining from speech.[15]

Newsgroups, listservs, chat rooms, and Web sites, are (from the point of view of the *speaker*) "public spaces" open to all.[16] For that reason, as the district court recog-

[15] The Government hints that the rule barring government from banning indecent speech may not apply when there are "no reasonably effective alternative" means of protecting children from indecent materials. Gov. Br. at 22. Here, there are effective alternatives. J.S. App. 32a-42a; *see infra* at 34-37. Further, the Government's suggestion finds no support in the relevant cases, which expressly recognize that alternative regulatory approaches will *not* protect all children from exposure, but conclude that this cannot justify a complete ban on adult access. *See Denver Area*, 116 S. Ct. at 2393; *Sable*, 492 U.S. at 130; *see also Riley v. National Fed. of the Blind*, 487 U.S. 781, 795 (1988) (although less intrusive means may not serve government's interests as effectively, "the First Amendment does not permit [Congress] to sacrifice speech for efficiency"). Moreover, Congress did *not* decide to ban speech among adults in the CDA. Because it misunderstood the nature of the Internet, Congress thought it could *protect* indecent speech between adults while regulating speech available to children. *See* Jim Exon, *The Communications Decency Act*, 49 Fed. Comm. L.J. 95, 95 (1996) ("The new law does not ban any constitutionally protected material from adults."); Br. of Members of Congress at 7-8. There is no need to consider overturning the *Sable* rule unless and until Congress makes the policy choice to ban speech among adults in order to protect minors.

[16] The analogy to "public spaces" does not apply, however, to the recipients of speech on the Internet, who must go in search of material with a given content and can control its entry into the home. Thus, concerns about unwilling exposure to "indecent"

nized, virtually all Internet speech that is available to adults will also be available to minors. J.S. App. 47a-48a. As a result, if § 223(d)(1)(B)—barring indecent speech that is "available" to minors—stood alone, that provision would prevent use of virtually all methods of communication on the Internet for the transmission of "indecent" messages or images to adults.[17] Because such a ban would clearly be unconstitutional, the only real question here is whether the affirmative defenses transform the Act into a valid regulation of speech to minors. They do not.

It is a defense that a speaker screened out minors by "requiring use of a verified credit card, debit account, adult access code, or adult personal identification number." § 223(e)(5)(B). But the Government's technology expert conceded, and the district court found, that this defense is *technologically unavailable* to speakers who use most modes of communication on the Internet. J.S. App. 49a-50a. The court "found that no technology exists which allows those posting on the category of newsgroups, mail exploders [listservs] or chat rooms to screen for age." *Id.* at 74a (Sloviter, C.J.) (summarizing factual findings); *see also id.* at 84a (Buckwalter, J.) ("[C]urrent technology is inadequate to provide a safe harbor to most speakers on the Internet."). This means that speakers using those modes of communication

> would have to reduce the level of communication to that which is appropriate for children in order to be protected under the statute. This would effect a *complete ban* even for adults of some expression, albeit "indecent," to which they are constitutionally entitled. and thus would be unconstitutional under the holding in *Sable* . . . .

Id. at 74a (Sloviter, C.J.) (emphasis added).

material that might arise if speech were publicly displayed on street corners or in other truly "public" places do not apply to speech displayed in cyberspace. *See* J.S. App. 49a; *infra* at 26-27.

[17] The sole exception would be an e-mail transmission to a recipient known to be an adult who is known to be using a computer that will not be accessible to a minor.

In fact, there is only one mode of communication on the Internet where it is technologically possible for the speaker to screen for age—the World Wide Web—and even that alternative is not available to most speakers. First, most Internet speakers do not have Web sites. Second, only Web sites that have the capacity to use a "cgi script" can screen for age, and *none* of the Web sites available to the 12 million subscribers to the major online service providers has that capacity. *Id.* at 51a. Thus, speakers who wished to screen for age would have to establish their own independent Web sites with cgi script capability, which takes time and costs money.[18]

Moreover, even for those speakers who have Web sites with the technological ability to screen for age, the district court further found that, "as a practical matter, non-commercial organizations and even many commercial organizations using the Web would find it prohibitively expensive and burdensome to engage in the methods of age verification proposed by the government." *Id.* at 74a (Sloviter, C.J.) (summarizing findings of fact); *see id.* at 53a (findings of fact) (there is no reason to believe that credit card companies would verify cards not being used for purchases and, even if they did, "the fee charged . . . to process a card, whether for a purchase or not, will preclude use of a credit-card verification defense by many non-profit, non-commercial Web sites").[19] It would also

[18] The Government's expert acknowledged, for example, that it would cost between $1,000 and $10,000 for a speaker to establish his own Web server, and it would cost even more to maintain the data bases required for age verification. J.S. App. 44a-45a. *See also id.* at 55a; Anker Test. Dec. ¶ 12-13.

[19] The district court also found that use of a credit-card verification system significantly delays information retrieval, and noted that the Government's expert "agreed that even 'a minute is [an] absolutely unreasonable [delay] . . . . [P]eople will not put up with a minute." J.S. App. 54a. In addition, the court found such a system would completely bar communication with adults who do not possess cards, *id.*, and would discourage others from retrieving a speaker's information, *id.* at 55a.

be wholly impractical for most such speakers to create their own adult access code systems. *Id.* at 55a.

Finally, the Government made *no* showing that third-party "age verification systems," which charge *listeners* for access to speech, are a practical option for Web speakers who wish to make their expression available for free. Although the Government now emphasizes this potential method of screening minors, below it "offered very limited evidence" regarding this possibility. J.S. App. 55a. The evidence did show, however, that "adult users, particularly casual Web browsers, would be discouraged from retrieving information" if this or any other form of password screening were required. *Id.* Existing age verification systems "appear to be used for accessing commercial pornographic sites." *Id.* Registering with those systems means associating your name with people who want to view "pornographic" sites. Even the Government's expert acknowledged that he would not be willing to register his name with such a system, and admitted he did not know whether those systems protected the privacy of registrants or sold their lists to others. Olsen Test. Tr. Vol. IV, 251:1-23, 255:1-22, Jt. App. 129-130, 132.[20] Thus, the only potential listeners who are likely to go to the trouble and expense of purchasing, in advance, adult ID's are persons interested in obtaining a large volume of sexually explicit material from commercial services. Few, if any, individuals will purchase such an ID in order to make a one-time visit to a Web site providing safe sex information or displaying controversial photographs in the tradition of Robert Mapplethorpe. *See* J.S. App. 55a.

Moreover, even assuming that some adults would undertake the expense and advance planning necessary to obtain an "adult ID," speakers would still face the often un-

[20] *See Denver Area*, 116 S. Ct. at 2391 (holding that an advance registration requirement was unduly burdensome because it required "considerable advance planning" to receive covered speech and because it would "restrict viewing by [those] who fear for their reputations should the operator, advertently or inadvertently, disclose the list").

surmountable task of reviewing all of their content to determine what parts of it might be "indecent." As the district court found, it would be economically impossible for many speakers to segregate their speech into "decent" and "indecent" areas. J.S. App. 55a, 57a. For example, it would cost the Carnegie Library of Pittsburgh millions of dollars to review the material it posts online in order to be able to segregate material that could be deemed "indecent." *Id.*; Croneberger Test. Decl. ¶¶ 32-35, Jt. App. 161-162. The only alternative for such speakers would be to designate *all* of their speech as indecent and require an "adult ID" for all content, thereby dramatically reducing the potential adult audience for all of their speech, and totally eliminating minors' access even to the non-indecent speech.

With respect to the "good faith" defense provided in § 223(e)(5)(A), the undisputed evidence showed that it does *nothing* to reduce the impact of the Act's criminal prohibitions. There simply are no "actions" a speaker can take that are sufficiently "effective" to provide reasonable assurance that minors will not gain access to a given communication. "[T]here is no such technology at this time." J.S. App. 79a.

In the district court, the Government's primary attempt to give meaning to the "good faith" defense was its argument that speakers could "tag" indecent speech with some identifier such as "L-18" or "XXX." But the Government steadfastly refused to say that such tagging would today constitute a defense under § 223(e)(5)(A).[21] Now, on

[21] *See* J.S. App. 58a ("Neither plaintiffs nor the Government suggest that tagging alone would shield minors from speech or insulate a speaker from criminal liability under the CDA."); *id.* at 79a. The reason is that "[t]here is no way that a speaker can use current technology to know if a listener is using [the] screening software" required to recognize and block tagged speech. *Id.* at 58a; *see id.* at 79a. In fact, computer browsers can use tags, such as "L-18" or "XXX" to *search for* and *retrieve* the tagged speech. It is clear the authors of the CDA did not view tagging as a defense. A principal concern expressed by Senator Exon, the CDA's chief sponsor, was the fact that sexually explicit text and

appeal, the Government only suggests that "tagging" might *become* a defense in the future, Gov. Br. at 38—a possibility that remains irrelevant to the ability of a speaker to comply with the CDA today.

Because of the technological and practical limitations on the availability of the Act's defenses, all indecent speech in newsgroups, listservs and chat rooms, and most indecent speech on Web sites, would have to be suppressed. The *only* speakers who would not be significantly affected are "commercial pornographers," because they already require payment by credit card for access to their speech. J.S. App. 135a.[22] The real impact of the Act will be on Appellees and the millions of other speakers who are not "pornographers." For example, the Act would have a truly devastating impact on libraries and on other non-commercial Web sites that post lawful but arguably "indecent" words and images for artistic, political or instructional purposes. All of that speech would effectively be banned.[23]

images *are* tagged with labels such as "XXX" that facilitate searches for this material. *See, e.g.*, 141 Cong. Rec. S8089 (daily ed. June 9, 1995). Moreover, Congress did not believe this defense could be used by most speakers today. The Conference Report merely said that "content selection standards" and "other technologies" that are *"currently under development, might* qualify" as defenses "if they are effective at protecting minors from exposure to indecent material via the Internet." Conf. Rep. at 190 (emphasis added).

[22] The most the Government can claim is that the CDA will force these "pornographers" also to charge for access to the "teasers" some currently make available for free. There was no evidence that such teasers are more than a minuscule amount of the "indecent" expression regulated by the Act.

[23] The consequences of such a ban were aptly described by Justice Kennedy just last Term: "Indecency often is inseparable from the ideas and viewpoints conveyed, or separable only with loss of truth or expressive power." *Denver Area*, 116 S. Ct. at 2415-16 (Kennedy, J., joined by Ginsburg, J.).

C. The Government Has Advanced No Legal or Factual Basis for Overturning the District Court's Conclusion That the CDA Operates As an Unlawful Ban.

The Government nevertheless argues that the CDA passes constitutional muster because it operates not as a ban but as a reasonable "restriction on the place and manner" in which indecent expression may be communicated. Gov. Br. at 39.[24] This argument is completely unpersuasive.

First, it reflects an unprecedently narrow understanding of what it means to "ban" speech. Under the Government's view, a law that makes it impossible for a speaker to speak to a particular newsgroup, listserv, or chat room audience he wishes to reach is not a "ban" if the speaker can post the same message on a Web site, where it will be available to a different audience at a different time. Gov. Br. at 40.[25] That is like arguing it is constitutionally permissible to ban leaflets, newspapers or magazines because the speaker could publish a book.

Moreover, the Government is even forced to argue that, in determining whether alternative modes of communication provide "reasonable opportunities" to speak, the Court should "limit its consideration to technical feasibility." Gov. Br. at 39-40. It contends that, in reviewing a content-based restriction on protected speech, this Court must *assume* that all speakers can use Web sites to screen for minors even though the district court found as a fact that Web site screening is prohibitively expensive for most

[24] The Government's apparent reliance on First Amendment principles applicable to "time, place or manner" restrictions is entirely misplaced. Those principles apply only when the regulation is content-neutral. *E.g., Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 536 (1980); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975).

[25] If that were the law, a flat ban on commercial "dial-a-porn" would be constitutional because a would-be speaker would still have the ability to publish a sexually explicit magazine or to produce a sexually explicit video instead. *But see Sable, supra.*

Web speakers, and even though most of the users of the Internet do not have Web sites at all.

The Government's argument should be rejected out of hand. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975) (" '[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' ") (quoting *Schneider v. State*, 308 U.S. 147, 163 (1939)). In determining whether a law bans speech, the question should be whether speakers have meaningful opportunities to reach the adult audiences they would like to reach. There must be available modes of expression that, as a technical *and practical* matter, enable speakers to reach those audiences, and without foregoing the distinctive and useful attributes of their chosen medium.[26]

Thus, here, the CDA clearly "bans" speech by barring would-be speakers from reaching the vast majority of potential recipients of their speech who will not seek out an "adult" Web site, but could be reached in newsgroups, listservs, and chat rooms. For a potential speaker who is interested in or outraged by a particular newsgroup posting or chat room conversation and wants to send an immediate reply, it is no answer to say that he could establish his own independent Web site, screen for age, and post his reply several days or weeks later on that site, where it might be accessed, but by a quite different audience.

[26] The Government cites no law supporting its remarkable claim that a law does not ban speech where it leaves "open" an alternative that most people cannot afford. Its brief includes two "*cf.*" cites to *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and *Sable*. Gov. Br. at 39. But those cases stand only for the proposition that in regulating speech the government may impose costs that are *not* prohibitive in their effects. *See, e.g., Renton*, 475 U.S. at 54 ("In our view, the First Amendment requires only that Renton refrain from *effectively* denying respondents a reasonable opportunity to open and operate an adult theater within the city . . . .") (emphasis added).

Second, the Government ignores the facts. Citing *no* evidence, and contrary to the district court's findings, it simply asserts that effective screening of minors is possible for speakers using *all* modes of communication on the Internet. Thus, it asks this Court to take it on faith that it is technologically feasible to set up adults-only listservs, chat rooms, and newsgroups. Gov. Br. at 37-38. But in the district court, the "Government offered *no evidence* that there is a reliable way to ensure that recipients and participants in such fora can be screened for age" and "presented *no evidence*" that these fora "could be effectively segregated to 'adult' or 'moderated' areas of cyberspace." J.S. App. 50a (emphasis added).[27] Indeed, the Government's own expert admitted there was no such evidence.[28]

Thus, in the real world, speakers will simply have to "choose between silence and the risk of prosecution." *Id.* at 61a. That is a choice Congress cannot constitutionally impose, even in the interest of protecting children.

III. EVEN IF THE CDA DID NOT EFFECTIVELY BAN SPEECH, IT IMPOSES SEVERE BURDENS ON PROTECTED SPEECH BASED ON ITS CONTENT, AND CANNOT SATISFY THE STRICT SCRUTINY REQUIRED FOR SUCH CONTENT-BASED BURDENS.

Even if the CDA were not a ban on protected speech, the foregoing discussion makes clear that the Act imposes serious *burdens* and *restrictions* on speech, based on its

[27] The Government's argument here is flatly inconsistent with its argument in *Shea v. Reno*, 930 F. Supp. at 942 ("The Government *does not claim* that § 223(e)(5)(B) serves as a defense for content providers using all *or even most* forms of on-line communication.") (emphasis added).

[28] *See* J.S. App. 50a ("Government expert Dr. Olsen agreed that no current technology could give a speaker assurance that only adults were listed in a particular mail exploder's mailing list."); *id.* ("Because of similar technological difficulties, individuals posting a message to a newsgroup or engaging in chat room discussions cannot ensure that all readers are adults, and Dr. Olsen agreed.").

content. Such a statute can be upheld only if it directly and substantially serves a compelling governmental interest in the least restrictive way possible. *See, e.g., Simon & Schuster, Inc. v. Members of New York St. Crime Victim's Bd.*, 502 U.S. 105, 115-16 (1991).

The CDA does not meet that test. Indeed, the Government does not really try to satisfy the requirements of strict scrutiny. It studiously refuses to specify the standard of review it must meet, while obliquely arguing for relaxed scrutiny, by drawing analogies to regulation of broadcasting (*Pacifica*) and zoning (*Renton*).[29] The Court should reject this apparent invitation to ignore well-established precedent and water down the applicable standard.

A. Strict Scrutiny Applies Here.

In the district court the Government "appear[ed]" to concede, and in *Shea v. Reno* it *did* concede, that strict scrutiny applies. J.S. App. 67a (Sloviter, C.J.); 930 F. Supp. at 939. These concessions were fully justified: under this Court's precedents, strict scrutiny is required where, as here, a law severely burdens "indecent" expression.[30] Without expressly changing course here, the Government bases its principal defense of the CDA on asserted analogies to *Pacifica* and *Renton*. Neither analogy is apt.

1. *Pacifica.* In *Pacifica*, the Court "did not purport . . . to apply a special standard for *indecent* broadcast-

[29] *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

[30] *See Sable*, 492 U.S. at 126; *Denver Area*, 116 S. Ct. at 2419 (Kennedy, J., joined by Ginsburg, J.); *id.* at 2429 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J.). The other four Justices in *Denver Area* chose not to resolve the question whether strict scrutiny applies to regulation of indecent material on leased and public access cable channels. They pointed out that two of the three provisions at issue were not direct restrictions on speech but merely authorized cable operators to limit programming. *Id.* at 2386-2394. They did not need to decide the standard applicable to the third provision because they concluded it was unconstitutional under both strict scrutiny and a more relaxed standard. *Id.*

ing." *Denver Area*, 116 S. Ct. at 2415 (Kennedy, J.) (emphasis added). It relied instead on the special nature of *broadcasting*. *Id.* Here, the district court correctly found that "Internet communication, while unique, is more akin to telephone communication, at issue in *Sable*, than to broadcasting, at issue in *Pacifica*." J.S. App. 67a-68a (Sloviter, C.J.). *See also id.* at 129a n.19 (Dalzell, J.). Indeed, many modes of communication on the Internet are more analogous to newspapers or the soapbox in the park.

Every reason given by the *Sable* Court for rejecting application of the *Pacifica* standard to "dial-a-porn" is equally applicable here:

> *Pacifica* is readily distinguishable . . . most obviously because it did not involve a total ban on broadcasting indecent material. . . . The *Pacifica* opinion also relied on the "unique" attributes of broadcasting, noting that broadcasting is "uniquely pervasive," can intrude on the privacy of the home without prior warning as to program content, and is "uniquely accessible to children, even those too young to read." . . . In contrast to public displays, unsolicited mailings and other means of expression which the recipient has no meaningful opportunity to avoid, the dial-it medium requires the listener to take affirmative steps to receive the communication. . . . Placing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message.

492 U.S. at 127-28 (citations omitted).[31]

The Government asserts that, like indecent broadcasts, "indecent material presented over the Internet 'confronts the citizen . . . in the privacy of the home.'" Gov. Br. at 28 (quoting *Pacifica*, 438 U.S. at 748). That assertion

[31] *See also Bolger*, 463 U.S. at 74 ("Our decisions have recognized that the special interest of the Federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication.") (footnote omitted).

completely ignores the contrary findings of the district court. Indecent material on the Internet must be affirmatively sought out; it does not just appear on the screen. *See* J.S. App. 49a ("Communications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.'").[32] Indeed, most online content is preceded by a description before content is actually accessed. *Id.*[33] The Government's own expert acknowledged that "the 'odds are slim' that a user would come across a sexually explicit site by accident." *Id.* (quoting Schmidt). Moreover, finding such material is beyond the ability (not to mention the interest) of the younger children who were the primary focus of concern in *Pacifica*. *See id.* ("A child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended."). And parents have much greater ability to block or screen content on the Internet than to block content on radio or television. *See* J.S. App. 32a-42a.

Moreover, the regulation at issue in *Pacifica* did not ban any speech; it simply channeled speech to certain times of the day when fewer minors would likely be in the broadcast audience. The CDA, in contrast, *bans* indecent speech at *any* time of day.[34] And the Court stressed that violation of the regulation at issue in *Pacifica* did not subject the speaker to *criminal* penalties, as does the CDA,

[32] *See also Shea v. Reno*, 930 F. Supp. at 940 ("Indecent content on the Internet ordinarily does not assault a user without warning: a child cannot gain access to Internet content with the touch of a remote control, and while accidental viewing of indecent content is possible, there is no evidence in this record to suggest that it is likely. Accordingly, we find strict scrutiny appropriate here.").

[33] The district court specifically found that "[a]lmost all sexually explicit images are preceded by warnings as to the content." J.S. App. 49a.

[34] Time channeling is possible for broadcasters, but *not* for Internet speakers. A message can be posted to a newsgroup or Web site at any time of day, and once posted will be accessible 24 hours a day.

and indicated that a criminal prohibition even of broadcast indecency might be unconstitutional. *See Pacifica*, 438 U.S. at 750.[35]

2. *Renton*. There is no basis for the Government's assertion that the criminal prohibition of speech at issue here is "very much like" the zoning restriction that was subjected to relaxed scrutiny in *Renton*. *See* Gov. Br. at 32. In *Renton*, the Court stressed that the zoning law at issue had nothing to do with the impact of speech on the listeners, and was based solely on the *secondary effects* of the presence of adult theatres on the community at large. 475 U.S. at 47. That rationale has no applicability here because the CDA is directly concerned with the alleged harmful impact of indecent expression on listeners. "To take an example factually close to *Renton*, if the ordinance there was justified by the city's desire to prevent the *psychological damage* it felt was associated with viewing adult movies, then analysis of the measure as a *content-based* statute would have been appropriate." *Boos v. Barry*, 485 U.S. 312, 321 (1988) (emphasis added). Thus, the CDA, like all *content-based* restrictions on speech, must be subjected to strict scrutiny. *See Forsythe County v. The Nationalist Movement*, 505 U.S. 123, 134-35 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation."); *Boos v. Barry*, 485 U.S. at 321 ("Regulations that focus on the direct impact of speech on its audience" are content-based.). More generally, the CDA is not properly subject to relaxed scrutiny on the ground that it merely regulates the "place" or "manner" of expression, any more than the restriction at issue in *Cohen v. California*, 403 U.S. 15 (1971), could be justified on the ground that it merely sought to regulate the place and manner of opposition to the draft. Time, place and manner restrictions receive relaxed scrutiny only when imposed for content-neutral reasons. *See supra* n.24.

[35] Finally, the Internet has none of the spectrum scarcity or barriers to entry problems the Court has relied upon to justify a relaxed standard for radio and TV. *See* J.S. App. 130a (Dalzell, J.).

Second, the law at issue in *Renton* merely regulated the physical *location* of the theatres. Thus, there was no pressure on speakers to self-censor or risk imprisonment. Here, in sharp contrast, Congress directly regulated the speech itself.[36]

For these reasons, the criminal prohibition at issue here is not "very much like" the zoning law at issue in *Renton*, and the reasons for applying less than strict scrutiny there do not apply here.

B. The Government Has Not Shown That the CDA Serves a Compelling Interest in a Direct and Material Way.

The Government does have a compelling interest in protecting at least some minors from exposure to at least some material that would be considered "indecent." *See Sable*, 492 U.S. at 126. But "[t]hat the Government's asserted interests are important in the abstract does not mean [that the challenged law] will in fact advance those interests." *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2470 (1994). To the contrary, even in a case involving *intermediate* scrutiny, "[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must . . . *demonstrate* that the recited harms are *real*, not merely conjectural, and that the regulation will *in fact* alleviate these harms in a *direct and material* way." *Id.* (emphasis added). Here, the Government has done neither.

1. *Existence of the Problem*. Congress made *no* findings regarding the existence or extent of the problem it sought to address.[37] It did not study the amount of "in-

[36] The Government's reliance on zoning laws, like the CDA itself, reflects a fundamental misunderstanding of the nature of cyberspace. Zoning laws are possible only when physical lines can be drawn and it can be determined whether the zoned business is on the right side or the wrong side of the line. But there are no lines or boundaries in cyberspace, and it is not possible to keep cyberspeech within a particular physical zone.

[37] The legislative history of the CDA is summarized in Robert Cannon, *The Legislative History of Senator Exon's Communications*

decent" material on the Internet, the sources of such material (including foreign origin), the extent of minors' actual contact with inappropriate material, or the ability of parents and other adults to control children's access to the Internet.[38] The Government's repeated claims about what Congress "found," *see* Gov. Br. at 5-7, are based on nothing more than individual comments in the congressional debates by a handful of the CDA's supporters, with no apparent empirical basis. Such comments are insufficient to satisfy strict scrutiny. *See Sable*, 492 U.S. at 129-30 (refusing to defer to supposed congressional findings of fact derived "from conclusory statements during the debates by proponents of the bill").

Furthermore, the record in this case is devoid of evidence of the actual extent of the supposed problem. All the Government showed was that sexually oriented materials are displayed in parts of the Internet, and they *could* be reached by a child with "some sophistication and some ability to read." J.S. App. 49a; *see id.* at 47a. This says nothing about the extent to which minors are actually viewing sexually explicit, indecent materials on the Internet. Parents have many ways to control how their children use the Internet—ranging from low-tech options like direct supervision (or simply locking the computer when they are not at home)[39] to parental empowerment devices

Decency Act: Regulating Barbarians on the Information Superhighway, 49 Fed. Comm. L.J. 51 (1996). *See also* Declaration of Senator Patrick J. Leahy in Support of ALA Plaintiffs' Motion for Preliminary Injunction (reciting legislative history of Act).

[38] A single hearing was held by the Senate, but it considered a *different* bill introduced by Senator Grassley. *See Cyberporn and Children: The Scope of the Problem, the State of the Technology, and the Need for Congressional Action*, Hearing Before the Senate Comm. on the Judiciary, 104th Cong. 1 (1995). Testimony and discussion focused on online obscenity and sexual solicitation and harassment of minors—but that type of speech is not at issue here. *See supra* n.2. There was limited discussion of some of the blocking and filtering technologies, but no substantial evidence questioning their efficacy.

[39] *See* Duvall Test., Tr. Vol. I, 107:3-7.

and the child-protection software offered by the major online providers and others. *See* J.S. App. 32a-42a. The record does *not* show that substantial numbers of parents are ignoring these options.

Nor is the Government's position bolstered by its attempt, for the first time on appeal, to redefine the interest Congress supposedly sought to further. The Government now declares that Congress had a purportedly "compelling interest in protecting the First Amendment interests of all Americans in using what has become an unparalleled educational resource." Gov. Br. at 31. It contends that unless the Internet is cleansed of "indecent" material, parents will refuse to bring the Internet into their homes. *Id.* at 30-31.

It is improper for the Government to defend the constitutionality of a law subject to strict scrutiny by conjuring up a new governmental interest on appeal. "To be a compelling interest, the [Government] must show that the alleged objective was the legislature's 'actual purpose' . . . ." *Shaw v. Hunt*, 116 S. Ct. 1894, 1902 n.4 (1996) (citation omitted). "The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation." *United States v. Virginia*, 116 S. Ct. 2264, 2275 (1996). Here, Congress did not find that the CDA was needed to prevent families from shunning the Internet. To the contrary, it specifically found elsewhere in the same Act that the "Internet and other interactive computer services have *flourished*, to the benefit of all Americans, with a *minimum* of government regulation." 47 U.S.C. § 230(a)(4) (emphasis added).[40]

Moreover, there is no evidence in the record to support this newly minted interest. The record shows that Internet use is expanding *exponentially*, *see, e.g.*, J.S. App.

[40] Indeed, Congress declared U.S. policy as "preserv[ing] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*." 47 U.S.C. § 230(b)(2) (emphasis added).

13a, and market forces are providing an ever-increasing number of user controls, *id.* at 35a, 146a (Dalzell, J.).

2. *Effectiveness of the Remedy.* The Government has not shown that the CDA will advance its interest in preventing minors from gaining access to indecedent materials on the Internet in a "direct and material" way. *Turner*, 114 S. Ct. at 2470. The CDA will not prevent minors from gaining access to indecent material that originates abroad.[41] Because that material constitutes a large percentage of all indecent material available in cyberspace, the CDA, at best, "provides only the most limited incremental support for the interest asserted." *Bolger*, 463 U.S. at 73.

The district court found that a "large percentage, perhaps 40% or more, of content on the Internet originates outside the United States." J.S. App. 59a.[42] It was stipulated that some foreign speech is sexually explicit. *Id.* at 47a, 59a.[43] Because of the global nature of the Internet,

[41] The Government's merits brief does not dispute this point. And the Government's expert acknowledged below that parents would have to rely on SurfWatch and similar *user*-based options to prevent their children from viewing indecent material posted abroad. Olsen Test., Tr. Vol. V, 44:6-45:8, Jt. App. 133-134.

[42] At least 30% of the sexually oriented sites SurfWatch blocks are known to be of foreign origin, and since origin cannot always be discerned, the actual number may be much higher. Duvall Test. Decl. ¶ 41, Jt. App. 104-105; Duvall Test., Tr. Vol. I, 161:17-162:18, Jt. App. 106-107. And, given the fact that some foreign countries are far more permissive than the United States regarding sexual materials, (Schmidt Test., Tr. Vol. IV, 131:14-24, Jt. App. 118), the likelihood of indecent foreign source material will remain high. Moreover, the problem of foreign source material is growing. Foreign networks are being added to the Internet faster than domestic networks, and at trial it was estimated that by now approximately half of all networks would be foreign. Hoffman Test. Decl. ¶¶ 107-113, Jt. App. 108-110; Hoffman Test., Tr. Vol. II, 68:5-69:11, Jt. App. 112-113.

[43] The Government has not challenged here, did not challenge below, and reasonably *could* not challenge the proposition that a very substantial percentage of the indecent communication on the

material posted overseas is just as available as information posted next door. *See* J.S. App. 47a. Moreover, the "pornographic" visual images the Government professes to be most concerned about are likely to be essentially identical regardless of their country of origin. "Pornography from, say, Amsterdam will be no less appealing to a child on the Internet than pornography from New York City." *Id.* at 145a (Dalzell, J.).

Accordingly, "the CDA will almost certainly fail to accomplish the Government's interest in shielding children from pornography on the Internet." *Id. See also Shea*, 930 F. Supp. at 941 (same). Indeed, the evidence showed that, if the CDA were upheld, it would be quite easy for commercial purveyors of sexually explicit speech to post *all* of that speech from abroad. *See* J.S. App. 145a n.22 (Dalzell, J.). Thus, the Act may simply "encourage American pornographers to relocate in foreign countries or at least use anonymous remailers from foreign servers." *Id.*[44]

It is no answer to say that the CDA would initially reduce, perhaps by half, the volume of sexually oriented material available over the Internet by suppressing all domestic speakers. Because of the nature of Internet searching, such a reduction would have *no* effect on the ability of children—acting without supervision and using computers with no screening or blocking—to access sexually oriented images. It would be the equivalent of allowing children to browse in "adult" bookstores after half

Internet—and, in particular, of "pornographic" images—are posted overseas.

[44] *See also* Cannon, *supra*, at 75 ("If the CDA were fully enforced in the United States, content providers could move questionable material or activity outside of the United States and outside the reach of the CDA. The final result would be that the material which Senator Exon sought to ban would remain available to users."); Hoffman Test. Decl. ¶¶ 115-118, Jt. App. 110-111 (anonymous remailers).

the adult books or videos had been removed. Such a law would not "directly and materially" advance the goal of preventing minors from gaining access to indecent materials. *See, e.g., Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520, 113 S. Ct. 2217, 2234 (1993) ("It is established in our strict scrutiny jurisprudence that 'a law cannot be regarded as protecting an interest "of the highest order" . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.'" (quoting *Florida Star v. B.J.F.,* 491 U.S. 524, 541-42 (1989)) (Scalia, J., concurring in part and concurring in the judgment); *Florida Star v. B.J.F.,* 491 U.S. at 540-41 (holding that law prohibiting disclosure of rape victims's name in any "instrument of mass communication" but not by other means did not directly and substantially further the law's stated purpose); *Smith v. Daily Mail Publishing Co.,* 443 U.S. 97, 104-05 (1979) (invalidating a law that barred newspapers, but not other media, from publishing names of juvenile offenders).[45]

Had Congress inquired into how the Internet works, it would have learned that it is impossible to prevent minors from gaining access to a substantial volume of "indecent" material by regulating speakers. The solution to that problem must focus on the only place where effective measures can be taken—at the recipient end.[46]

C. A More Narrowly Tailored, and More Effective, Method of Restricting Access By Minors Would Be Promoting the Development and Use of Recipient-Based Controls.

The CDA is also unconstitutional because there are less restrictive measures Congress could have selected that

[45] *See also Denver Area,* 116 S. Ct. at 2416 ("Partial service of a compelling interest is not narrow tailoring.") (Kennedy, J., joined by Ginsburg, J.)

[46] *See* Cannon, *supra,* at 83 ("Government regulation can do nothing to stop [offshore offensive material]. Software can effectively block sites regardless of location.").

would have been much *more* effective in preventing minors from gaining access to indecent online material.

The district court made extensive findings about the ability of user-based software and control mechanisms to prevent children from accessing indecent material, regardless of where it is posted. J.S. App. 32a-42a. The Government ignores these findings. Citing two isolated remarks by one legislator, it claims Congress concluded that these blocking and filtering mechanisms are insufficient. Gov. Br. at 40. In fact, Congress made *no* specific findings regarding the use or effectiveness of these mechanisms. In another section of the Act, however, Congress did make a general finding that is flatly inconsistent with the Government's argument here, concluding that interactive computer services "offer users a *great degree of control* over the information that they receive." 47 U.S.C. § 230(a)(2) (emphasis added).

The Government claims that "parental control software is used by only a very small percentage of households, that have access to the Internet." Gov. Br. at 41. There is no support for this broad assertion.[47] Moreover, the Government ignores the parental control options the major online service providers themselves offer to their 12 million subscribers—options that permit parents easily to block or screen access to the Internet. *Id.* at 41a-42a; *supra* at 6.

The Government's argument that parents may neglect to use these options should be rejected for the same reasons the *Denver Area* Court rejected the Government's argument that "lockboxes" were insufficient to deal with

[47] The Government refers only to SurfWatch and ignores all of the other blocking and filtering software programs available to parents, such as Cyber Patrol, many of which have been made available free of charge to the millions of subscribers to commercial online services. J.S. App. 36a, 39a.

cable television indecency.[48] Even though the Court assumed that parents would have to spend time and money to find and buy cable lockboxes, learn how to use them, and exercise vigilance to ensure they were being used correctly, it nevertheless held that such practical problems "do not show need for a provision as restrictive" as a segregate and block requirement. 116 S. Ct. at 2393. Rather, such concerns called for "informational requirements" urging parents to use "readily available blocking equipment." *Id.* Similarly, here, a far less restrictive means of addressing the Government's concern would be to educate parents and school administrators about the Internet and the availability of blocking and filtering tools, to assist them in acquiring such technologies and information, and to support additional research and development.[49] Indeed, one of the unfortunate consequences of the CDA has been to lull parents into a false sense of security that the government has taken care of the problem when, in fact, the problem is still there and will be *unless* parents exercise parental responsibility.

Congress' decision in another portion of the same Act to rely on user-based controls to address concerns about children's access to "indecent" and "violent" speech on

[48] The analogy is particularly relevant because cable lockboxes operate similarly to the available Internet blocking and screening technologies.

[49] *See* J.S. App. 81a (Sloviter, C.J.) ("When Congress decided that material unsuitable for minors was available on the Internet, it could have chosen to assist and support the development of technology that would enable parents, schools, and libraries to screen such material from their end.").

Such an approach would have been *more* consistent with Congress' statement of U.S. policy in the Act: "to encourage the development of technologies *which maximize user control* over what information is received by individuals, families, and schools who use the Internet and other interactive computer services" and "to remove disincentives for the development and utilization of blocking and filtering technologies that *empower parents* to restrict their children's access to objectionable or inappropriate online material." 47 U.S.C. §§ 230(b)(3), 230(b)(4) (emphasis added).

broadcast television further demonstrates that the CDA is not narrowly tailored. There, instead of focusing on broadcast speakers, Congress focused on the recipients of broadcast speech. It required television manufacturers to install a so-called "V-chip" so that television sets could "read" a code voluntarily assigned to television shows by private entities—thus allowing parents to screen out content they deem inappropriate for their children.[50] As in *Denver Area*, "Congress' different, and significantly less restrictive treatment of a highly similar problem [is] at least *some indication* that more restrictive means are not 'essential.'" 116 S. Ct. at 2393 (emphasis in original).

Recipient-based screening would not prevent all minors from gaining access to indecent material. But the approach adopted by Congress, while imposing much more severe burdens on protected speech, would not prevent *any* minors from gaining access to the substantial volume of indecent material posted abroad. The First Amendment forbids Congress from adopting such a pointless burden on protected speech.

IV. THE CHALLENGED PROVISIONS ARE UNCONSTITUTIONALLY VAGUE.

The CDA "indecency" standard is also unconstitutional because its key terms—"indecent," "patently offensive," "depictions or descriptions of sexual activities," "in context," and "community standards"—fail to provide clear notice of what is permitted and what is proscribed. This constitutional requirement applies with particular force here because First Amendment rights are at stake. *See Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Smith v. Goguen*, 415 U.S.

[50] *See* 47 U.S.C. § 303(x). The "V-chip" is designed to screen not only violence, but also "indecent" and sexually oriented speech. 47 U.S.C. § 303(w)(1). *See also* Act, § 551(a)(8) (citing "compelling government interest in *empowering parents* to limit the negative influences of video programming that is harmful to their children") (emphasis added).

566, 572-73 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *NAACP v. Button*, 371 U.S. 415, 438 (1963). *See also Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 689 (1968) (statutory purpose of protecting minors does not justify relaxation of these requirements). Vague statutes cause potential speakers to "steer far wider of the unlawful zone," *Speiser v. Randall*, 357 U.S. 513, 526 (1958), "then if the boundaries of the forbidden areas were clearly marked," *Baggett v. Bullit*, 377 U.S. 360, 372 (1964).

The vagueness problem is especially pronounced here for three reasons. First, the CDA is a *criminal* statute that carries very substantial penalties. *See Hoffman Estates*, 455 U.S. at 498-99. Uncertainty concerning the CDA's scope is thus far more likely to result in self-censorship than were the modest civil penalties accompanying the FCC "broadcast indecency" standard. *See Pacifica*, 438 U.S. at 750 (reserving whether criminal penalties could be imposed for indecent speech even in the broadcast context); *see also* J.S. App. 78a (Sloviter, C.J.).

Second, the Internet consists of a set of uniquely affordable modes of communication which are used for informal, spontaneous expression, often in "real time," by millions of ordinary individuals. *See, e.g.*, J.S. App. 29a, 43a, 46a. Unlike magazine retailers (*Ginsberg*), radio stations (*Pacifica*), commercial telephone services (*Sable*), or cable television programmers (*Denver Area*), the vast majority of online speakers do not have the time or the means to retain lawyers to pre-screen their communications.[51] Ordinary Americans are not accustomed to facing imprisonment for their casual utterances and their "hastily typed idea[s]." J.S. App. 29a.[52]

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[51] *Cf. Hoffman Estates*, 455 U.S. at 498 (businesses "plan behavior carefully" and "consult relevant legislation in advance of action," so the precision of statutes regulating business activity need not be as great as in other contexts).

[52] Although the Government attempts to downplay the CDA's application to written text, the Government's brief confirms that

Third, the Internet is a global medium in which speech posted anywhere is available everywhere. J.S. App. 47a. Speakers are thus subject to prosecution in any community in the country for anything they say on the Internet.[53] They must try to ascertain, and tailor their speech to fit, the "community standards" of the least tolerant community in the nation. For example, a speaker wishing to disseminate AIDS awareness or safe sex information would run the risk that such information might be considered patently offensive, and thus subject to prosecution, in one particularly intolerant community.

The utter inability of the law's defenders to agree on its meaning is telling proof of its unconstitutional vagueness. Below, the Government's lawyers and experts were "unable to define 'indecency' with specificity." J.S. App.

Internet users must worry about being prosecuted even for purely textual communications that do *not* involve the so-called "seven filthy words" and that could not subject their authors to prosecution in any other medium. *See* Gov. Br. at 40-41 ("Because indecent material can appear in *numerous verbal forms*, there can be no guarantee that any particular software program will screen all indecent sites simply by searching for particular words or phrases.") (emphasis added).

[53] *See* Amicus Brief of Morality in Media Inc., at 14 n.9. *Cf. Hamling v. United States*, 418 U.S. 87 (1974) (obscenity); *United States v. Thomas*, 74 F.3d 701, 711-12 (6th Cir.), *cert. denied*, 117 S. Ct. 74 (1996) (affirming conviction for online obscenity, and employing Tennessee community standard for material posted in California). The FCC has developed a national "community standard" for broadcast indecency, but that standard (like so much of the broadcast indecency test), presupposes the presence of a single, expert administrative agency to discern and enforce that standard. *See In re Liability of Sagittarius Broadcasting Co.*, 7 F.C.C. Rcd 6873, 6876 (1992) (FCC's indecency standard "does not address a particular geographic area, but relies instead on the expertise of Commissioners drawing on their knowledge of the views of the average viewer or listener, as well as their general expertise in broadcast matters"). If the CDA's drafters intended a single *national* "community standard" for the online "community," *cf.* Br. of Members of Congress at 8-9, they provided *no guidance* about how such a standard should be determined and what its content should be.

99a (Buckwalter, J.). They fare no better here. On the one hand, the Government insists that speech of serious value will rarely if ever violate the CDA. Gov. Br. at 44. On the other hand, the Government, echoing the Conference Report, argues that the CDA's indecency standard is equivalent to the broadcast indecency standard at issue in *Pacifica*, and serious value speech may be found indecent under that standard. The Congressional sponsors of the CDA are more frank in acknowledging that even speech with "truly serious value" can be prosecuted, and admit that juries will be free to determine whether speech is patently offensive based on their assessment of a "host of variables," none of which is specified in the text of the statute itself. Br. of Members of Congress at 13. Yet they contend that the standard of "online indecency" will be *different* from the broadcast standard. *Id.* at 6. Their proposed standard provides even less guidance than does the broadcast indecency standard.[54] Most importantly, whatever the "online indecency" standard "*would*" be, *id.*, it cannot be found in the text of the statute they drafted.

None of the Government's other arguments salvage the CDA. Reasoning from the questionable premise that "one out of three ain't bad," the Government contends that the Court's approval of the *three*-prong liability standards in *Miller v. California*, 413 U.S. 15, 24 (1973), and *Ginsberg v. New York*, 390 U.S. at 632-33—both of which required that expression be "patently offensive"—provides

[54] The Congressional *amici* state that the CDA "would allow unrestricted availability of anything that can be aired on radio or TV, or lawfully sold or displayed to a minor in a store, on a billboard, on one's jacket in public, or provided to a minor by phone, fax, mail, cable, or in a school, museum, or library." Br. of Members of Congress at 6. This explanation is mystifying, because most of the media to which the Members refer are not regulated for "indecency" at all, and those media that are regulated are subject to standards altogether different from the CDA—notably the "harmful to minors" standard in state statutes governing retail sale of books and magazines.

"powerful support" for the conclusion that the CDA is not vague. Gov. Br. at 42.[55]

From the perspective of the potential speaker, however, eliminating two of the three *Miller/Ginsberg* prongs greatly compounds the vagueness of the standard and increases the pressure to self-censor. Under *Miller* and *Ginsberg*, a speaker is safe as long as he knows his speech *either* is not prurient *or* has serious value. In stark contrast, under the CDA, a speaker can be convicted even if his speech (like George Carlin's in *Pacifica*) is not prurient and has serious value.

A criminal prohibition that turns *entirely* on whether listeners (or jurors) find the speech in question "patently offensive" comes perilously near to what the First Amendment most emphatically prohibits. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Bolger*, 463 U.S. at 71. Because of its subjectivity, "offensiveness" is an open invitation to discrimination against unpopular and unorthodox viewpoints. *See Forsythe County*, 505 U.S. at 132-33. Our deep historic distrust of government officials' ability to make "principled distinctions in this area" is why "the Constitution leaves matters of taste and style so largely to the individual." *Cohen v. California*, 403 U.S. at 25.

[55] The Government simply ignores the important fact that the "patently offensive" prong of the *Miller* standard is significantly more precise than the CDA standard because it requires that the speech in question depict or describe "sexual *conduct*" that has been "*specifically defined*" by law. *Miller*, 413 U.S. at 24 (emphasis added). The CDA speaks in far more general terms of "depict[ions] or descri[ptions]" of "sexual or excretory activities or organs." § 223(d)(1)(B).

Moreover, the two prongs of the *Miller* test the CDA *does not* incorporate are especially significant. If indeed the CDA was designed to address the problem of "pornography" on the Internet, then it is simply remarkable that Congress did not make prurient appeal a requirement for liability, for prurience is the *raison d'etre* of pornography. *See Roth v. United States*, 354 U.S. 476, 488 (1957). And the omission of a "serious value" exemption means that the CDA threatens expression at the core of First Amendment values, such as social and political satire, *see Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

The Government's reliance on *Denver Area* is similarly misplaced. The provision upheld there against a vagueness challenge was not a criminal statute; indeed, it was not even a direct governmental restriction of speech. It imposed no sanctions directly on cable programmers (the speakers), but instead authorized certain private parties (cable television operators) to refuse to carry "patently offensive" material over their systems.[56] Because programmers themselves were not subject to liability in *Denver Area*, there was little danger of "chilling" expression through self-censorship.[57] That cannot be said here.

Many of the CDA's constitutional flaws result from Congress' effort to transplant the FCC-administered broadcast indecency standard to a *criminal* statute "administered" by hundreds of prosecutors, juries and judges. *See* Conf. Rep. at 188 (adopting FCC standard from *Pacifica*); Br. of Members of Congress at 7-8.[58] It is common for an

[56] As both the plurality and the dissenters noted, cable television operators' *own* First Amendment rights were importantly at stake in *Denver Area*, and weighed in favor of vindicating the operator's authority to exclude material from their networks. By contrast, the CDA criminalizes speech based on its content, the paradigm case where the First Amendment "interests" all run in one direction—in favor of the speaker.

[57] The *Denver Area* plurality also stressed several aspects of the law that limited operators' discretion to construe the "patently offensive" standard too broadly, or to apply it arbitrarily, including the requirement that cable operators develop a "written and published policy" explaining their basis for barring programming, the programmer's ability to challenge the "reasonableness" of a cable operator's decision (without risking imprisonment), and regulatory oversight by local licensing authorities. 116 S. Ct. at 2390. No limitations are applicable here.

[58] Although the Conference Report cites *Pacifica* and the FCC broadcast indecency standard as the source and model for the CDA, the Report proceeds to misstate the FCC standard in critical ways. For example, the Report mistakenly states that the CDA standard protects serious value speech because the FCC broadcast standard requires "intention to be offensive," and "material with serious redeeming value . . . is quite obviously intended to edify and educate, not to offend." Conf. Rep. at 189 (quoted in Gov. Br. at 42). But the broadcast standard *does not* include an "intention to offend" requirement (which would make it nearly impossible to convict even "pornographers"). Far from immunizing "serious-value" speech, the FCC decision cited in the Conference Report confirms that "merit" is just "one of the many variables that make up a work's 'context'," adding that serious value receives no "greater weight than [the FCC] give[s] other variables." *Infinity Broadcasting Corp.*, 3 F.C.C. Rcd 930, 933 (1987) (cited, under an erroneous title, at Conf. Rep. at 189).

administrative agency to apply, and over time refine, a standard requiring consideration of a "host of variables," *Pacifica*, 438 U.S. at 750 (quoted in Br. of Members of Congress at 11, 13), that have to be balanced against each other in an *ad hoc* fashion.[59] But such a standard is obviously ill-adapted—substantively and procedurally—for a criminal statute. Neither the Government nor *amici* can explain how potential speakers on the Internet can reasonably predict how this multivariate calculus would apply to what they propose to say, so they may decide whether to speak or not. The result will obviously be that many speakers will simply "steer . . . wide[] of the unlawful zone." *Speiser*, 357 U.S. at 526.

As the district court recognized, the Government's position reduces to an appeal that it be "trusted" to restrict the CDA to only "reasonable" uses. J.S. App. 82a-83a (Sloviter, C.J.), 98a-99a (Buckwalter, J.). But the void-for-vagueness doctrine is designed to save regulated parties, especially parties who wish to *speak*, from having to rely on the grace of "well-intentioned prosecutors." *Baggett v. Bullitt*, 377 U.S. at 373. *See also Keyishian v. Board of Regents*, 385 U.S. 589, 599 (1967).

V. THE DISTRICT COURT DID NOT ERR IN PRELIMINARILY ENJOINING ALL THREE CHALLENGED PROVISIONS.

The district court unanimously concluded that all three challenged provisions were likely to be found unconstitu-

[59] The "variable" that was important in *Pacifica* itself—the time of day of the speech—has little or no application in cyberspace. *See supra* n.34.

tional. J.S. App. 62a. Below, the Government made no real effort to distinguish between these provisions. On appeal, however, the Government attempts for the first time to defend the three provisions separately, arguing that even if the "display provision" (§ 223(d)(1)(B)) is unconstitutional, the other two provisions (§§ 223(a)(1)(B) and 223(d)(1)(A)) are not. Those provisions should be construed, the Government now asserts, to require "knowledge" that at least *one* recipient of the speech is a minor. The fundamental question remains, however, whether that minor must be the *only* recipient.

Section 223(a)(1)(B) criminalizes an indecent transmission "knowing that *the* recipient" is a minor. (Emphasis added.) The example posed by the Government when addressing this section hypothesizes a speaker who learns that *one* of the recipients of his speech in a chat room is a minor and then *separately* sends a "private" indecent e-mail message to that minor alone. Gov. Br. at 24. It is left unclear whether, if the speaker transmits that same indecent message to the chat room, that would violate § 223(a)(1)(B) as well, even if everyone else in the chat room was an adult.[60] If so, § 223(a)(1)(B) poses the same constitutional issues as the display provision, because speakers cannot control who can access their speech in most modes of communication in cyberspace, including the very example the Government uses, chat rooms.[61]

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[60] The fact that the Act's defenses, by their terms, apply to §§ 223(a)(1)(B) and 223(d)(1)(A) indicates that Congress intended those sections to criminalize speech when *any* recipient is known to be a minor, even if most recipients are adults. In its Opposition to the Motion to Affirm filed by the ACLU Appellees, the Government expressly stated that it interpreted *both* provisions as applying when *any* (not the *only*) recipient was known to be a minor. Gov. Opp. Br. at 4 n.1.

[61] It is also unclear what "knows" means in this context. *Compare Ginsberg*, 390 U.S. at 646 (defining "knowingly" in context of state "harmful to minors" statute). In a chat room or newsgroup addressing topics of interest to both minors and adults, the speaker may "know" (in the sense of being virtually certain or having substantial reason to believe) that at least one of the recipients is a minor. Conversely, because it is technologically impossible to verify the age of recipients in newsgroups or chat rooms, the speaker cannot actually "know" that one of the recipients was a minor even if one *claims* to be a minor. In the Government's hypothetical, however, once one recipient falsely claims to be a minor, the speaker would have to refrain from any indecent communication even if, in fact, all of the recipients are adults. It is also unclear what the speaker can lawfully do if the only recipient who claims to be a minor then claims (truly or falsely) that he is *leaving* the chat room or the newsgroup. Could the speaker then resume indecent communications?

Section 223(d)(1)(A) even more clearly poses the same constitutional problems as the display provision. That section makes it a crime "to send" a patently offensive communication "to a specific person or persons" under 18. Literally, it would be a crime to post a message to a newsgroup or chat room with knowledge that *any* "specific" recipient is a minor, even if every other recipient is an adult. The Government's assertion that this provision nonetheless "does not prohibit adult-to-adult communications" (Gov. Br. at 25) is merely a restatement of its incorrect argument that speakers can comply with the CDA's defenses, and can therefore limit their speech to adults. As found by the district court and demonstrated in Point II, *supra*, however, that argument is wrong.

The Government's exclusive reliance on *Ginsberg* is entirely misplaced. In *Ginsberg* the New York "harmful to minors" statute imposed *no* ban or burden on the distribution of constitutionally protected materials to adults because, as the Court stressed, it *was* possible for commercial booksellers to confine their in-person sales of magazines to customers who were known to be adults. Therefore, the law at issue in *Ginsberg*, unlike the CDA, was "not invalid under [the Court's] decision in *Butler*." 390 U.S. at 634.[62] Nor was there any issue in *Ginsberg*

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[62] Moreover, *Ginsberg* involved material that was "obscene for children," 390 U.S. at 635-36, a standard specifically rejected by Congress in adopting the CDA. Conf. Rep. at 189. And the *Ginsberg* Court expressly declined to opine as to the constitu-

as to the efficacy of the prohibition: the regulated sales all took place within the regulating jurisdiction, where all violations could be prosecuted. Here, as the district court found, the CDA cannot stop the transmission of indecent communications from foreign sources, even if the speaker knows the recipient is a minor.

Finally, the Government's new construction of these two provisions does not eliminate or reduce their vagueness. *See supra* Point IV.

If the Government's new interpretations raise any question regarding the propriety of the district court's conclusion that these two provisions are likely to be found unconstitutional, the proper course is for the Court to affirm and allow the district court, when considering permanent relief, to develop a record that is relevant to those new interpretations.[63] This Court should not itself undertake to review, *ab initio*, without a record, the constitutionality of these newly coined constructions.

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tionality of restricting minors' access to material under any other standard. 390 U.S. at 636-37. In addition, *Ginsberg* applied solely to commercial purveyors of sexually oriented material. The Court stressed that "the prohibition against sales to minors *does not bar parents* who so desire from purchasing the magazines for their children." *Id.* at 639 (emphasis added). Unlike in *Ginsberg*, under the CDA it would be unlawful for a parent to transmit indecent communications to his or her teenager. Similarly, it would be unlawful for a college professor to communicate indecent literature to a 17-year-old college student (for example, *Ulysses* or *Lady Chatterly's Lover*). And it would be a felony for two teenagers to exchange "indecent" or "patently offensive" jokes. The Government makes no pretense that it has a compelling interest in criminalizing such communications.

[63] Because the Government did not advance these interpretations of §§ 223(a)(1)(B) and 223(d)(1)(A) below, there is no evidence in this record regarding the types and extent of one-to-one "indecent" communications to known minors that are occurring on the Internet. If, for example, those communications are principally unlawful child solicitations, they are irrelevant to this case because Appellees did not challenge and the district court did not enjoin the provisions prohibiting child solicitation, child pornography, or obscenity. *See supra* n.2.

VI. THE ACT CANNOT BE SALVAGED BY SEVERANCE OR BY A NARROWING CONSTRUCTION.

The Government argues that the district court erred in enjoining enforcement of the CDA as a whole, and should have allowed enforcement against "commercial" speakers who charge for their speech. Gov. Br. at 45-48. This argument is without merit for several reasons.

First, despite its rhetoric, the Government is not really advocating "severance." This is not a situation in which the Court can strike some word or phrase or section in the Act and leave the remainder intelligible and enforceable as written. *Compare Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504-05 (1985) (upholding obscenity statute to extent the word "lust" could be excised); *United States v. Grace*, 461 U.S. 171, 180-81 (1983) (narrowing statute's application based on categories identified in the statute).[64] What the Government is really advocating is that this Court rewrite the Act to apply only to a narrow category of commercial speakers not singled out in the Act.[65]

Second, the premise of the Government's argument is wrong: the Act is unconstitutional in *all* of its applications. Contrary to the Government's assertion, *see* Gov.

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[64] The Government's reliance on the severability clause of the 1934 Communications Act, 47 U.S.C. § 608, is misplaced. The presence of a severability clause does not provide an independent basis for a court to create statutory distinctions that will dramatically alter the substantive reach and basic functioning of a statute. A severability clause only raises a presumption that, where appropriate, Congress generally would want valid provisions of a statute to be separated from invalid ones. It "is an aid merely; not an inexorable command." *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924); *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968) ("whatever relevance such an explicit clause might have in creating a presumption of severability . . . the ultimate determination of severability will rarely turn on the presence or absence of such a clause") (internal citation omitted).

[65] Congress clearly intended to regulate "both commercial and non-commercial" speakers. Conf. Rep. at 191. *See supra*, 11-12.

Br. at 47, the district court did not conclude that the Act could be applied constitutionally even to commercial speakers who charge for their speech. The fact that they (and they alone) could screen for age does not cure the vagueness of the terms "indecent" and "patently offensive" as standards for criminalizing speech in cyberspace. *See Whitehill v. Elkins*, 389 U.S. 54, 58-59 (1967) (holding statute void for vagueness and declining to consider severability clause and proposed narrowing construction because with a vague statute, the "difficulty goes deeper"); *accord Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983). Moreover, because most such speakers already require credit card payment for access to their speech, limiting the scope of the Act to those speakers would do almost nothing to further the Government's interest.

Third, a law that, on its face, unconstitutionally restricts speech in the vast majority of its applications is subject to facial invalidation. *Forsythe County*, 505 U.S. at 129-30; *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574-75 (1987); *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Such a law cannot be sustained—even in part—by a showing that it has *some* constitutional applications. A facially unconstitutional statute can be salvaged only if it is " 'readily susceptible' to a narrowing construction" that eliminates its unconstitutional applications. *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988). A statute is not "readily susceptible" to a narrowing construction if adopting that construction would require the Court to draw lines based upon policy choices that are legislative in nature, especially where congressional intent is unclear. *See United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1019 (1995).[66] The Court "will not rewrite a . . . law to

[66] As the Court recognized in *United States v. Reese*, 92 U.S. 214, 221 (1875), "[i]t would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the Judicial for the Legislative Department of the government." *See also Osborne v. Ohio*, 495 U.S. 103, 121 (1990) (noting that judicial rewriting of statutes would diminish Congress' "incentive to draft a narrowly tailored law in the first place").

conform it to constitutional requirements." *Id.; see also Blount v. Rizzi*, 400 U.S. 410, 419 (1971) (refusing to rewrite a federal obscenity law because "it is for Congress, not this Court, to rewrite the statute").

Limiting the CDA to commercial speakers would require the Court to make legislative judgments about the appropriate reach of Congress' first attempt to regulate communications in this new and rapidly changing medium. For example, what is the definition of a "commercial" speaker: one who charges for access to his or her speech, or any money-making enterprise? Should the statute be narrowed to apply only to "commercial pornographers," as the Government suggests in its Jurisdictional Statement, J.S. at 26, or should it sweep more broadly to encompass all "commercial Web sites," as the Government suggests in its merits brief? Gov. Br. at 46. These are policy judgments Congress must make. As in *NTEU*, there is no way to identify the line Congress would have drawn had it enacted a narrower CDA. It is certainly not possible for this Court to discern what Congress would have done if it had had the benefit of the comprehensive record developed in this case.

"To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of [a court's] duty." *United States v. Reese*, 92 U.S. 214, 221 (1875).

CONCLUSION

For all the foregoing reasons, the Court should affirm the three-judge district court's order issuing a preliminary injunction.

Respectfully submitted,

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February 20, 1997

(25) No. 96-511

Supreme Court, U.S.
FILED
FEB 20 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JANET RENO, *et al.*,

Appellants,

—v.—

AMERICAN CIVIL LIBERTIES UNION, *et al.*,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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INTRODUCTION

The government appeals from a preliminary injunction barring the enforcement of the Communications Decency Act of 1996 (CDA),[1] which imposes criminal penalties on constitutionally protected speech occurring on the Internet. The Internet has no parallel in the history of human communication. It provides millions of people around the globe with a low-cost method of conversing, publishing, and exchanging information on a vast array of subjects with a worldwide and virtually limitless audience. It also provides a foundation for new forms of community -- communities based not on any accident of geographic proximity, but on bonds of common interest, belief, culture or temperament.

As Congress itself recognized, "[t]he Internet . . . offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[2] The CDA jeopardizes each of these goals. Unless enjoined, it will reduce this "never-ending, worldwide conversation" to a level deemed suitable for children. Appendix to the Jurisdictional Statement 146a (J.S. App.).

Specifically, the CDA makes it a crime, punishable by up to two years in prison, for anyone to use online computer communications to transmit or "display in a manner available to minors" any material that is "indecent" or "patently offensive." Because there is no way for the vast majority of Internet speakers to distinguish between adults and minors in

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[1] The challenged provisions of the CDA were enacted as Title V of the Telecommunications Act of 1996, Pub.L.No. 104-104, §502, 110 Stat. 56, 133-35. The CDA will be codified at 47 U.S.C. §§223(a) to (h), and it is those citations that plaintiffs will use throughout this brief.

[2] §230(a)(3).

their audience, the CDA is the most restrictive censorship scheme imposed on any medium. For that reason, among many others, the government has yet to convince even a single federal judge that the statute, as written, can be sustained.

STATEMENT OF THE CASE

This appeal arises from two consolidated cases challenging the constitutionality of the CDA. A three-judge district court heard five days of testimony on plaintiffs' motions for a preliminary injunction, including an online demonstration of all of the methods of communicating on the Internet.[3] The court also considered numerous affidavits and extensive documentary evidence submitted by both sides. The decision to grant a preliminary injunction was unanimous. All three judges agreed that the statute violated the First Amendment. Two members of the panel also concluded that the critical provisions of the CDA were unconstitutionally vague.[4]

The preliminary injunction decision in this case is supported by 409 separate factual findings. The overwhelming majority of the findings (334) were derived from a joint stipulation submitted by the parties.[5] Those findings, which

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[3] The three-judge court was convened pursuant to a special judicial review provision. Title V, Subtitle B, Pub.L.No. 104-104, §561(a), 110 Stat. 142.

[4] A separate challenge to §223(d), filed in the Southern District of New York, also resulted in a preliminary injunction from a three-judge court on July 29, 1996. *Shea v. Reno*, 930 F.Supp. 916 (S.D.N.Y. 1996). The government's appeal in *Shea* is pending before this Court.

[5] The district court's findings appear in the record in two separate places. A total of 123 findings are set forth in the district court opinion (continued...)

are not disputed by the government, comprehensively describe the plaintiffs, their speech, the nature of the Internet as a communications medium, the inadequacy of the statutory defenses relied on so heavily by the government, the ineffectiveness of the CDA in accomplishing its asserted goals, and the availability of less restrictive alternatives that enable parents (rather than the government) to decide what material their children should see.

A. The Statutory Framework

The criminal provisions challenged in this action are embodied in two sections of the CDA. Section 223(a)(1)(B) applies to "telecommunications device[s]." J.S. App. 6a-7a n.5. Under §223(a)(1)(B), it is a felony to transmit an "indecent" communication "knowing that the recipient of the communication is under 18 years of age." The term "indecent" is undefined in the statute.[6]

Section 223(d)(1) applies to "interactive computer services." It criminalizes communications to minors that, "in context, depict[] or describe[], in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."[7] Section 223(d)(1)(A)

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[5] (...continued)
itself. J.S. App. 12a-61a, ¶¶1-123. The stipulated description of the plaintiffs and their speech was incorporated by reference in the district court opinion but not set out in full. *Id.* at 12a n.9. Those paragraphs appear as an appendix to the Motion to Affirm in *Reno v. ACLU*, and are cited hereafter with the prefix "M.A."

[6] Section 223(a)(1)(B) also prohibits the transmission of "obscene" communications on the Internet. This case does not challenge the application of existing obscenity, child pornography, or solicitation laws to the Internet.

[7] The government argues that "indecency" and "patent offensiveness" (continued...)

makes it a crime to "use[] an interactive computer service to send [such material] to a specific person or persons under 18 years of age."[8] Section 223(d)(1)(B) makes it a crime to "display [such material] in a manner available" to any person under eighteen.[9]

Until reaching this Court, the government made very little effort to distinguish among these provisions or to defend their constitutionality, standing alone. Rather, throughout the district court proceedings, the government's case primarily relied on the defenses set forth in §223(e)(5). Section 223(e)(5)(A) creates an affirmative defense for anyone who "has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to [prohibited] communication[s] . . . ." Section 223(e)(5)(B) creates an affirmative defense for anyone who "has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number."

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[7] (...continued)
have the same meaning. Brief for Appellants (Gov't Brief) at 10. While the statute itself provides no support for the government's position, *see* J.S. App. 64a-65a (Sloviter, J.), *id.* at 91-93a (Buckwalter, J.), plaintiffs will use the term "indecency" in this brief to refer to both §223(a) and §223(d).

[8] On appeal, the government asserts that §223(a)(1)(B) and §223(d)(1)(A) apply to the same types of communication and differ only in the type of technology that they cover. *See* Gov't Brief at 24-25 & n.6.

[9] Plaintiffs also challenged and the district court struck down §§223(a)(2) and (d)(2), which make it a crime to "knowingly permit" use of a telecommunications facility for expression prohibited by §§223(a)(1)(B) or 223(d)(1).

B. The Reach Of The CDA: Plaintiffs And Their Speech

The plaintiffs in these consolidated cases illustrate the spectrum of individuals and organizations who use online computer networks to communicate, send, display and access information, including information that could be considered "indecent" or "patently offensive."[10] Plaintiffs include nonprofit public interest organizations, such as the American Civil Liberties Union (ACLU), American Library Association (ALA), Planned Parenthood Federation of America (PPFA), Human Rights Watch (HRW), Electronic Privacy Information Center (EPIC), and Electronic Frontier Foundation (EFF), as well as for-profit corporations such as Wildcat Press, BiblioBytes, and Prodigy.

Individual plaintiffs include Kiyoshi Kuromiya, who runs the Critical Path AIDS site on the World Wide Web, and Declan McCullagh, who alone operates the Justice On Campus Web site and a popular online discussion list on censorship issues. M.A. 23a-26a, ¶¶176-188; *id.* at 27a-28a, ¶¶194-97. Corporate speakers and trade groups include Microsoft, the American Booksellers Association, and the National Writers Union. Some plaintiffs provide material that is accessed by large numbers of people each day, M.A. 1a-5a, ¶¶70-84; *id.* at 23a-26a, ¶¶176-88, while others simply send an occasional e-mail to relatives or friends, *id.* at 14a, ¶131. Some plaintiffs also provide access to the Internet in addition to being speakers and users of online information. *See id.* at 16a-17a, ¶¶140-44; 23a-26a, ¶¶176-88.

The plaintiffs do not speak with a single voice or on a single issue. However, all plaintiffs engage in speech that may be regarded as "indecent" by some communities across

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[10] For a more thorough description of the plaintiffs, *see* M.A. 1a-63a, ¶¶70-356.

this country, notwithstanding its social value.[11] As set forth in the record, that speech includes the following:

Speech about AIDS, safer sex practices, and prisoner rape: Plaintiffs include several individuals and organizations who engage in frank speech about sexual practices. Critical Path is typical. *See generally* J.A. 136-49. Both directly and through access to other sites, Critical Path provides an extensive online library concerning the transmission and treatment of AIDS.[12] The Critical Path Web site is accessed as often as 10,000 times per day by people all over the world. *Id.* at 138, ¶12. By definition, the information it provides deals with sexual activity, which is frequently described in colloquial terms that can be generally understood by its intended audience.

The importance of this information was summarized by Kiyoshi Kuromiya, who testified: "In my view, the information that Critical Path provides saves lives of both teenagers and adults and any attempt to censor or restrict the free flow of this life-saving information would be a critical public health mistake." Kuromiya Test. Decl. at 35, ¶13, ¶15, ¶16; *see also* M.A. 23a-36a, ¶¶176-188. Other plaintiffs also provide explicit information about safer sex. For example, the Safer Sex Web Page includes a photograph that illustrates the proper method of putting on a condom. *See* Pl.Exh. 50. They also host an online discussion group

[11] The government has consistently refused to say that plaintiffs' speech is not covered by the CDA, and has never challenged the standing of any of the plaintiffs. J.S. App. 12a n.9; *see also id.* at 107a (Dalzell, J.).

[12] Critical Path also sponsors online support groups, and provides low-cost Internet access to persons in the AIDS community. J.A. 136-38, ¶¶1-12.

that allows individuals to discuss issues, such as how to talk about safer sex with a partner. *See* M.A. 29a-31a, ¶¶203-214; *see also id.* at 18a-21a, ¶¶155, 161; 32a-33a, ¶¶221-28.

Plaintiff Stop Prisoner Rape (SPR), a nonprofit organization dedicated to combatting the rape of prisoners and providing assistance to survivors, has a Web site that contains a variety of documents about prisoner rape that use raw, street language to discuss violence, sex and certain excretory functions used to humiliate victims. The site publishes testimonial letters from survivors that describe their brutal victimization and the psychological as well as physical devastation they experienced; these letters educate the public by conveying the horrible realities of prisoner rape in ways that statistics could never do. SPR also provides a forum for survivors to talk openly about their anger and fears, receive important survival tips, and dispel uneducated myths about the subject. *See* Donaldson Test. Decl.; M.A. 17a-19a, ¶¶145-154.

Speech about gay and lesbian issues: Plaintiffs also include individuals and organizations who engage in speech of particular interest to gay men and lesbians. For example, Wildcat Press, a publisher of gay and lesbian literature, sponsors two electronic magazines (e-zines) on the World Wide Web that are written by and for gay and lesbian youth. Patricia Nell Warren testified that the YouthArts e-zines "provide a creative forum for many youth to discuss their coming out, their experiences with gay life and their sense of their own identity . . . . Many of the contributors openly discuss sex and sexuality, often using slang common to their age group." Warren Test. Decl. at 9, ¶¶21, 23; *see also* M.A. 26a-27a, ¶¶189-193. *See id.* at 22a-23a, ¶¶168-175. Plaintiff National Writers Union hosts an online mailing list called "NWU-queer" for writers who are gay, lesbian, or bi-sexual. *See id.* at 14, ¶131.

Speech about censorship and human rights: Several of the plaintiffs engage in speech concerning censorship. For example, the ACLU posts online information that includes the text of the famous "Seven Dirty Words" comic monologue that was declared "indecent" in *FCC v. Pacifica*, 438 U.S. 726 (1978). In addition, the ACLU hosts online discussions on a variety of civil liberties topics, ranging from efforts to censor Howard Stern's best-selling book, "Private Parts," to a discussion of masturbation as part of a larger debate over the firing of former Surgeon General Jocelyn Elders. *See* M.A. 3a-4a, ¶¶78-80.

Human Rights Watch, a nongovernmental organization that monitors and promotes the observance of international human rights, posts some of its reports on their Internet site. Those reports can include graphic language about prostitution, rape, and torture involving sexual mutilation. *See id.* at 5a-6a, ¶¶85-92. Plaintiffs EPIC, EFF, Justice on Campus and Cyberwire Dispatch use the World Wide Web and online discussion groups to communicate about censorship; among other things, they often provide excerpts of censored material. *See id.* at 6a-10a, ¶¶1893-106; 27a-29a, ¶¶194-202.

Controversial speech: Plaintiffs also include authors, publishers, and teachers who use the Internet to write or provide access to fiction and nonfiction that often uses strong language and addresses controversial issues. These plaintiffs include the Ethical Spectacle, an online newsletter that has discussed Nazi experimentation and the morality of pornography; BiblioBytes, an online bookseller with over one thousand titles including romance novels, erotica, classics, and horror; ClariNet and Cyberwire Dispatch, who publish news articles that sometimes uses vulgar and graphic language; and the Journalism Education Association, a national organization of high school teachers that assists minors with online research on many subjects, including

teenage sexuality, abortion, art and literature. *See id.* at 31a, ¶¶215-20; 15a-16a, ¶¶135-39; 21a-22a, ¶¶162-67; 28a-29a, ¶¶198-202; 10a-11a, ¶¶107-13.

Of course, the reach of the CDA extends far beyond the actual plaintiffs in this case. The government's own witnesses testified that the magazine *Vanity Fair*, with a nude cover photo of the actress Demi Moore, would be potentially indecent in some communities, J.A. 118-19, as would a political discussion that included the sentiment "Fuck the CDA," Olsen testimony, Tr. Vol. V, at 53-53. *See also* J.S. App. 99a (Buckwalter, J.); *id.* at 119a (Dalzell, J.). The trial court also found that artworks such as nudes by Edward Weston, material from contemporary films such as "Leaving Las Vegas," and reproductions of ancient Indian sculptures, are all within the CDA's broad proscriptions. *See id.* at 42a-47a, ¶¶74-75, 78, 85; 71a; 76a-77a.

C. The Nature Of The Internet

The Internet is a "unique and wholly new medium of worldwide human communication." *Id.* at 46a, ¶81. Simply described, it is a giant, global communications network that connects innumerable smaller computer networks. *Id.* at 12a, ¶1. While difficult to estimate due to rapid growth, the Internet is believed to connect over 9,400,000 host computers worldwide and as many as 40 million people. *Id.* at 13a, ¶3. Only about 60% of the Internet's host computers are currently located in the United States, and the percentage of foreign sites is growing. *Id.* The medium allows "literally tens of millions of people . . . to exchange information. These communications can occur almost instantaneously, and can be directed either to specific individuals, to a broader group of people interested in a particular subject, or to the world as a whole." *Id.* at 13a-14a, ¶4. In the words of the trial court, "[i]t is no exaggeration to conclude that the content on the Internet is as diverse as human thought."

Id. at 43a, ¶74. In addition to its vast online libraries, the Internet hosts conversations and even "'virtual communities' that simulate social interaction." *Id.*; *see also* Rheingold Test. Decl. at 2-3, ¶¶5-6 ("[V]irtual communities enable people to form associations that can enrich their lives and often carry over into face to face society").

As the trial court found, the evidence below "showed significant differences between Internet communications and communications received by radio or television." J.S. App. 49a, ¶89. Communications on the Internet do not "'invade' an individual's home or appear on one's computer screen unbidden." *Id.* at 49a ,¶88. Rather, the receipt of information on the Internet "requires a series of affirmative steps more deliberate and directed than merely turning a dial." *Id.* at ¶89. In addition, because the Internet is interactive, individuals can talk back, opposing speech they find disagreeable with more speech. The court also found that "[t]he start-up and operating costs entailed by communication on the Internet are significantly lower than those associated with use of other forms of mass communication," permitting its use by individuals as well as large corporations. *Id.* at 44a, ¶76. The Internet is thus distinct because it is "not exclusively, or even primarily, a means of commercial communication." *Id.* at 43a, ¶75.

Search engines, which help computer users find information on the Internet, can on occasion "accidentally retrieve material of a sexual nature through an imprecise search." *Id.* at 49a, ¶88. However, the district court found many factors that decreased the likelihood of such an "accident":

> A document's title or a description of the document will usually appear before the document itself . . . and in many cases the user will receive detailed information about a site's content before he or she need take the step to access the document. Almost all sexually explicit images are preceded by warnings as to the content. Even the Government's witness, Agent Howard Schmidt, Director of the Air Force Office of Special Investigations, testified that the "*odds are slim*" that a user would come across a sexually explicit site by accident.

Id. (emphasis added).[13]

D. How Communication Takes Place On The Internet

There are a variety of ways in which users can communicate in cyberspace. *See generally id.* at 21a-25a, ¶¶22-32. Electronic mail (e-mail) allows an online user to address and transmit a message to one or more people, "comparable in principle to sending a first class letter." *Id.* at 21a, ¶23. In addition, there are a wide variety of online discussion forums that allow groups of users to discuss and debate subjects of interest. The three most common methods for online discussion are mail exploders, USENET newsgroups, and chat rooms.

Mail exploders, also called listservs, allow online users to subscribe to automated mailing lists that discuss particular subjects of interest. Subscribers send an e-mail message to the "list," and the mail exploder automatically and simultaneously sends the message to all of the other subscribers on

[13] While there was no dispute during the preliminary injunction proceedings that some sexually oriented material is available on the Internet, *id.* at 74a, ¶¶82-84, it is not "the primary type of content on this new medium." *Id.* at ¶83.

the list; subscribers can reply to the message by sending a response to the list. *Id.* at 22a, ¶24. Users of mailing lists can typically add or remove their names from the list automatically, with no direct human involvement. *Id.*

USENET newsgroups are huge databases of messages arranged according to subject matter, and online users may read or send a message to any newsgroup at any time without a prior "subscription." *Id.* at 22a-23a, ¶25. "USENET newsgroups . . . are among the most popular and widespread applications of Internet services, and cover all imaginable topics of interest to users." *Id.* There are newsgroups on more than 15,000 different subjects; "[c]ollectively, almost 100,000 new messages (or 'articles') are posted to newsgroups each day." *Id.* at 24a, ¶26.

In addition, chat rooms, or "Internet Relay Chats," allow "individuals on the Internet [to] . . . engage in an immediate dialog, in 'real time,' with other people on the Internet . . . . IRC is analogous to a telephone party line, using a computer and keyboard rather than a telephone." *Id.* at 24a, ¶27. There are thousands of different chat rooms available, "in which collectively tens of thousands of users are engaging in conversations on a huge range of subjects." *Id.*

Finally, one of the most well-known methods for communicating information online is the "World Wide Web," which allows users to publish (or "post") documents, or "Web pages," that can then be accessed by any other user in the world. *See generally id.* at 25a-32a, ¶¶33-48. Most Web documents contain "links," which are "short sections of text or image which refer to another document." *Id.* at 27a, ¶36. When selected by the user, the "linked" document is automatically displayed, wherever in the world it is actually stored. *Id.* "These links from one computer to another, from one document to another across the Internet, are what

unify the Web into a single body of knowledge, and what makes the Web unique." *Id.* at 28a, ¶39. Ease of access, the court found, has been the key to the tremendous success of the Web. *Id.* at 32a, ¶8.

E. The Inadequacy Of The Statutory Defenses

Because the government essentially conceded that the CDA would be unconstitutional in the absence of the statutory defenses,[14] there was extensive evidence below on whether those defenses -- credit card verification, adult verification, or "good faith, reasonable, effective, and appropriate actions . . . to restrict or prevent access by minors to [prohibited] communications" -- were actually available to speakers on the Internet. It concluded they were not.

Thus, the district court found that *none* of the defenses were available *at all* to online speakers who communicate, debate and exchange information by e-mail, mail exploders, USENET newsgroups, and chat rooms. J.S. App. 49a, ¶90 ("There is no effective way to determine the identity or the age of a user who is accessing material through e-mail, mail exploders, newsgroups, or chat rooms"); *see also Shea*, 930 F.Supp. at 941 ("[A]s the government concedes, for the vast majority of applications and services available on the Internet, a user has no way of communicating . . . with certainty that the content will not reach a person under eighteen").

Specifically, the district court found that "[t]here is no reliable way in many instances for a sender to know if the e-mail recipient is an adult or a minor." J.S. App. 50a, ¶90. "The difficulty of e-mail age verification is compounded for mail exploders . . . which automatically send information to

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[14] *See Shea*, 930 F.Supp. at 941.

all e-mail addresses on a sender's list." *Id.* The government's expert agreed that no current technology could "give a speaker assurance that only adults" were subscribed to the list. *Id.*

Similarly, the defenses do not work for USENET newsgroups. *Id.* at 50a, ¶91. Newsgroups are "disseminated using ad hoc, peer to peer connections between approximately 200,000 computers . . . around the world," *id.* at 23a, ¶25, and the "dissemination of messages . . . is an automated process that does not require direct human intervention or review," *id.* at 23a-24a, ¶25. Likewise, speakers who communicate in real time through chat rooms "cannot ensure that all readers are adults." *Id.* at 50a, ¶90. Moreover, it is not technologically possible for speakers in e-mail, mail exploders, newsgroups, or chat rooms to "segregate" their speech in a way that would prevent its availability to persons under 18. *Id.* at 50a, ¶92.

A different set of problems exists with the World Wide Web. As the district court found, the statutory defenses are not available *at all* for the large number of speakers who post content on the Web created through the commercial online services such as America Online (AOL), CompuServe and Prodigy. *Id.* at 51a, ¶96. The statutory defenses are meaningless to these Web sites because there is no way at present for them to determine the age of someone visiting the site. Other speakers on the Web can, in theory, use special technology to interrogate users through a fill-in-the-blank form. However, the mandatory use of this technology to request credit cards or age verification would pose an insurmountable economic burden for many Web sites.

First, credit card companies will not verify a credit card number unless the request is tied to a commercial transaction. Credit card verification is thus entirely unavailable to Web sites that do not charge for access, including many op-

erated by plaintiffs in this case. *Id.* at 53a, ¶98. Second, credit card companies charge for verification. Even if they were willing to provide credit card verification without an underlying transaction, the cost would be prohibitive for many Web sites. *Id.* at 53a-54a, ¶¶99-100.

The court was also unconvinced by the government's argument that content providers on the Web could request adult verification through other means. The court found that the government had offered only "very limited evidence regarding the operation of existing age verification systems, and the evidence offered was not based on personal knowledge." *Id.* at 55a, ¶103. The government's own witness admitted that "his knowledge of these services was derived primarily from reading the advertisements on their Web pages . . . and [he] could not testify to the reliability of their attempt at age verification." *Id.* at ¶103; *see also* J.A. 114-16 (Testimony of Howard Schmidt); *id.* at 120-25, 128-33 (Testimony of Dan Olsen). Further, there was evidence that existing adult verification systems, to the extent they are used at all, are used "for accessing commercial pornographic sites [which] charge users for their services." J.S. App. 55a; *see also* J.A. 130-32.

The trial court also considered whether speakers could take any other action that might constitute a "good faith, reasonable, and effective way" to keep "indecent" materials from minors; the court found that there were no such actions available to speakers. The government had suggested two options that do not now exist but that might be implemented in the future. First, the government suggested that all Internet speakers, or at least a subset of Web speakers, could work together to set up an age verification system. But, as the district court found, "the administrative burden of creating and maintaining a screening system and the ongoing costs involved is beyond the[] reach" of many noncommercial organizations, and prohibitive even for commercial enti-

ties. J.S. App. 55a, ¶105. Furthermore, "the government presented no testimony as to how such systems could ensure that the user of the password or credit card is in fact over 18." *Id.* at 56a, ¶107.

Second, the government proposed a "tagging" system in which speakers would label their speech "indecent." *Id.* at 56a-58a, ¶¶108-116. This, too, was rejected by the district court, which found that tagging alone is totally ineffective, *id.* at 58a, ¶114 and can never be effective without the cooperation of "third parties to block the material on which the tags are embedded" -- parties who are not subject to criminal prosecution under the CDA. *Id.* at 79a. In addition, tags alone would still fail to resolve the technological impossibility of most speakers to send their tagged speech only to adults and not to minors. *Id.* at 58a, ¶116. Because the CDA is a criminal statute, the district court also dismissed as speculative the government's suggestion that a "consensus among speakers" might soon emerge "to use the same tag to label 'indecent' material," and that the industry might (at some future point) develop computer software "that recognizes the tags and takes appropriate action when it notes tagged speech." *Id.* at 57a-58a, ¶¶113-14.[15]

The trial court found that mandatory age verification also placed unwarranted noneconomic burdens on speech over the Internet. For example, the court found that "[v]erification of a credit card over the Internet is not now technically possible." *Id.* at 53a. Currently, the volunteer who runs the Critical Path AIDS Project does not have to be online at all while persons around the world instantaneously access the site thousands of times in a twenty-four hour period. To obtain advance credit card authorization before any user could access the site would require the volunteer to supervise the site around the clock and to delay access to each of the thousands of users until he could go off-line to verify the card. As the trial court found, that process "would significantly delay the retrieval of information on the Internet," *id.* at 54a, ¶101, thus damaging the ease of access that is one of the principal virtues of the medium. The government's expert agreed that even "a minute is [an] absolutely unreasonable [delay]." *Id.* In addition, the court found that some Web users would be discouraged from retrieving information if an adult ID or credit card were required. *Id.* at 55a-56a, ¶106. Finally, there was evidence that mandatory age verification would prohibit anonymous access to sensitive material on the Internet. J.A. 143, ¶23.

[15] Furthermore, the court found that, even if tagging were technologically possible, the task of determining which material to tag indecent "would be extremely burdensome for organizations that provide large amounts of material." *Id.* at 57a, ¶110. For example, "[t]he Carnegie Library would be required to hire numerous additional employees to review its online files at an extremely high cost to its limited budget." *Id.*

F. The Ineffectiveness Of The CDA And The Availability Of Less Restrictive Alternatives

It is undisputed that a "large percentage, perhaps 40% or more" of Internet content "originates outside of the United States," and that at least some of this content is sexually oriented. J.S. App. 59a, ¶117; *see also* Hoffman Testimony, Tr. Vol. II, at 68-69 (the number of foreign-based sites is growing and will soon reach 50%). It is also undisputed that "[f]oreign content is otherwise indistinguishable from domestic content . . . since foreign speech is created, named, and posted in the same manner as domestic speech." *Id.* Thus, despite the CDA, minors will continue to have access to all of the "indecent" material posted outside the United States as easily and as cheaply as domestic sites. Furthermore, "indecent" information that is now posted do-

mestically can be readily moved off-shore. *Id.* at 145a n.22 (Dalzell, J.).

Finally, the trial court issued extensive factual findings concerning the variety of voluntary measures available to restrict minors' access to online communications that their parents may consider unsuitable for them. *Id.* at 32a-42a, ¶¶49-73. Twenty-one paragraphs of these findings were based on stipulations by the parties, *see id.* at 32a n.12, which identified many different and currently available user-based features that enable parents to block certain online content, *id.* at 35a-41a.

First, the trial court reviewed user-based software products such as SurfWatch and Cyber Patrol, and found that "[t]he market for this type of software is growing, and there is increasing competition among software providers to provide products." *Id.* at 35a, ¶54. Unlike the CDA, these software programs *are* effective at controlling sexually oriented material originating from foreign sites. *See* J.A. 104-07, ¶41.

Second, the trial court considered parental control options offered by the large commercial online services such as AOL, Microsoft Network and Prodigy, free of charge to their members. J.S. App. 41a, ¶69. For example, AOL offers a "'Kids Only' parental control feature [that] allows parents to establish an AOL account for their children that accesses only the Kids Only channel on America Online." *Id.* at 41a-42a, ¶69. In addition, CompuServe and Prodigy give their subscribers the option of blocking access to bulletin boards and chat rooms within their networks. *Id.* at 42a, ¶71.

G. The Decision Below

Based on these extensive and largely undisputed findings, Chief Judge Sloviter concluded that "the CDA is not

narrowly tailored, and the government's attempt to defend it on that ground must fail." *Id.* at 81a. Judge Buckwalter stressed that "individuals attempting to comply with the statute . . . have no clear indication of what actions will ensure that they will be insulated from criminal sanctions under the CDA." *Id.* at 100a. And Judge Dalzell described the Internet as "the most participatory marketplace of mass speech that this country -- and indeed the world -- has yet seen." *Id.* at 141a. Because the CDA "would necessarily reduce the speech available for adults on the medium," Judge Dalzell added, it is "constitutionally intolerable." *Id.* at 144a. All three judges agreed that the CDA should be preliminarily enjoined.

SUMMARY OF ARGUMENT

This Court has consistently held that the government may not criminalize constitutionally protected speech for adults in the guise of protecting children. Yet, that is precisely what the CDA does. As the lower court found, the vast majority of Internet users can only comply with the CDA by self-censoring their speech to a level deemed acceptable for minors. If speakers choose not to, or guess wrong, they face a substantial prison sentence.

The government correctly conceded in the lower courts that the CDA must be subject to strict scrutiny because it is content-based. The government's efforts in this Court to disavow the strict scrutiny test are unpersuasive. In particular, criminal regulation of the Internet cannot be analogized to administrative regulation of broadcast, especially since none of the rationales that support regulation of broadcast apply to the Internet. To the contrary, "[t]he Internet is a far more speech-enhancing medium than print, the village green, or the mails," as Judge Dalzell observed below. J.S. App. 144a. As Judge Dalzell further observed, "a Newspa-

per Decency Act passed because Congress discovered that young girls had read a front page article in The New York Times on female genital mutilation in Africa, would be [clearly] unconstitutional." *Id.*

The CDA clearly fails strict scrutiny because it is not narrowly tailored. The trial court correctly found as a matter of fact that the statutory defenses were completely unavailable to the vast majority of speakers, and economically prohibitive for other speakers. In addition, the CDA is ineffective at achieving the government's goal because it will not prevent minors from accessing the "indecent" material posted outside the United States. The CDA is also significantly more restrictive than readily available user-based blocking software and other alternatives that enable parents to decide what their children will read and see.

The CDA is also both overbroad and vague. The record in this case establishes that a vast range of valuable speech has been placed in jeopardy by the CDA. In addition, the government has been unable to define with clarity what the statute means and what it covers. Indeed, the sponsors of the CDA endorse for the first time in an *amicus* brief an interpretation of the statute different than the one they proposed in Congress and different than the one asserted by the government throughout this litigation. Plaintiffs are left to speak at their own peril; prosecutors are unconstrained by any meaningful guidelines.

Finally, the government's eleventh-hour effort to salvage two sections of the CDA by narrowing their focus should be rejected. The argument is based on interpretations of the statute that were not proffered below, that are inconsistent with the plain meaning of the statute when taken as a whole, that contribute to the CDA's vagueness, and that fail to cure its fatal overbreadth.

ARGUMENT

I. THE CDA REPRESENTS A UNIQUE CENSORSHIP SCHEME THAT DEMANDS STRICT JUDICIAL SCRUTINY

A. The CDA Is Unconstitutional As A Flat Ban On Protected Speech

The decision below rests on the critical finding that the vast majority of Internet speakers cannot distinguish between minors and adults in their audience. As a result, they cannot comply with the CDA unless they speak only in language suitable for children. The CDA therefore operates as a criminal ban on constitutionally protected speech among adults.

Just last Term, this Court cited the long-standing First Amendment rule that prevents the government from "reduc[ing] the adult population . . . to . . . only what is fit for children." *Denver Area Educational Television Consortium v. FCC*, 518 U.S. __, 116 S.Ct. 2374, 2393 (1996)(citations omitted)(*Denver Area*). Even under the guise of protecting children, the government may not justify the complete suppression of constitutionally protected speech because to do so would "burn up the house to roast the pig." *See Butler v. Michigan*, 352 U.S. 380, 383 (1957)(invalidating a conviction for distribution of indecent publications). Similarly, in *Sable Communications v. FCC*, the Court struck down a total ban on indecency in phone communications because it had the "effect of limiting the content of adult [communications] to that which is suitable for children." 492 U.S. 115, 131 (1989). Indeed, because "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox," this Court has *never* upheld a *criminal* ban on indecent speech. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983)(striking down a ban on mail advertisements for contraceptives). Applying this

well-established law to the trial court's findings yields the inescapable conclusion that the CDA is flatly unconstitutional.

B. The CDA Must Be Subject to Strict Scrutiny

If the CDA is not *per se* unconstitutional as a flat ban under *Butler*, it is certainly subject to strict scrutiny as a content-based restriction on speech. Indeed, the government conceded as much throughout this litigation until its last brief.[16] Perhaps abandoning that view, the government now makes reference to five different standards, refusing to choose among them. The government's new position is both confused and wrong.

"Indecency" (unlike obscenity) is constitutionally protected speech that often *has* substantial social value and *lacks* prurient interest. *Sable*, 492 U.S. at 126. Subject only to "narrow and well-understood exceptions, [the First Amendment] does not countenance governmental control over the content of messages expressed by private individuals." *Turner Broadcasting System v. FCC*, 512 U.S. __, __, 114 S.Ct. 2445, 2458-59 (1994)(citing *R.A.V. v. St. Paul*, 505 U.S. __, __, 112 S.Ct. 2538, 2547 (1992)); *Texas v. Johnson*, 491 U.S. 397, 414 (1989)). The "indecency" and "patently offensive" provisions of the CDA are unquestionably content-based bans on protected speech, and thus are presumptively unconstitutional. Content-based regulations of speech will be upheld only when they are justified by

[16] The trial court noted that "[t]he government's position on the applicable standard has been less than pellucid but . . . it now appears to have conceded that it has the burden of proof to show both a compelling interest and that the statute regulates least restrictively." J.S. App. 67a. *See also Shea*, 930 F.Supp. at 939 ("At oral argument, the Government's counsel conceded that strict scrutiny analysis is appropriate . . . .").

"compelling" governmental interests and "narrowly tailored" to effectuate those interests. *See Turner Broadcasting*, 114 S.Ct. at 2455; *Simon & Schuster, Inc. v. New York State Crimes Victims Bd.*, 502 U.S. 105 (1992); *Sable*, 492 U.S. 126 (1989); *Bolger*, 463 U.S. 60 (1983). This Court has applied strict scrutiny to content-based regulations because "[a]t the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broadcasting*, 114 S.Ct. at 2458.

The application of strict scrutiny to the CDA is also fully consistent with this Court's recent decision in *Denver Area*, 116 S.Ct. 2374. Five members of the Court agreed that strict scrutiny was the appropriate test for any cable regulation that burdened speakers' rights.[17] Because it is a criminal statute and not a regulatory scheme, the CDA imposes a more onerous burden on speech than the burden invalidated in *Denver Area*. The scope of the CDA is also more expansive. Its "indecency" ban potentially affects the speech of millions of Americans who use the Internet and who do not have the benefit of legal advice attempting to discern the limits of permissible expression.

The *Denver Area* plurality found it "unnecessary and unwise" to settle on a single standard to resolve the case, noting the dynamic and rapid changes taking place in telecommunications technology. *Id.* at 2385. But the facts in this case establish that the CDA would effectively *destroy* the innovation and growth that the Court in *Denver Area* cautiously sought to protect and that have been essential to

[17] *See id.* at 2407, 2419 (Kennedy and Ginsberg, JJ., concurring in part and dissenting in part); *id.* at 2424, 2429 (Thomas, J., Rehnquist, C.J., and Scalia, J., concurring in part and dissenting in part).

development of the Internet.[18] In Judge Dalzell's words, "The CDA will, without doubt, undermine the substantive, speech-enhancing benefits that have flowed from the Internet." J.S. App. 133a. In short, the high First Amendment stakes in this case demand strict judicial review.

C. The Government's Reasons For Rejecting Strict Scrutiny Are Unpersuasive

Citing *FCC v. Pacifica*, 438 U.S. 726, the government argues that its power to regulate "indecent" speech on the Internet should be as broad as its power to regulate "indecent" radio broadcasts. *Pacifica*, however, is easily distinguishable. First, it did not involve a total ban on "indecent" speech. Second, the district court in this case specifically found that the chances of accidentally encountering "indecent" speech on the Internet are slight. Third, there is nothing in the record to support the government's claim that sexual content on the Internet is "uniquely accessible to children." Fourth, the government improperly recharacterizes *Pacifica* as a case about "pervasiveness" rather than "invasiveness." If the government could justify a content-based regulation whenever a communications medium became "pervasive" in American homes, bans on "indecency" in books, on the telephone, or even in normal conversation would be constitutional. That is plainly not the law.[19]

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[18] "[I]f the medium is reconstituted to accommodate the Act, it will cease to possess those unique characteristics which are responsible for its growth and adoption as a communications medium by individuals the world over and which represent its potential as a revolution in democratic communication." Hoffman Test. Decl. at ¶139.

[19] In addition, the primary justification for intermediate scrutiny in the broadcast cases was spectrum scarcity. By contrast, the Internet has vir- (continued...)

The government's effort to justify a lower level of scrutiny based on *Ginsberg v. New York*, 390 U.S. 629 (1968), is also misguided. The statute in *Ginsberg* only prohibited materials found to be "obscene as to minors," *id.* at 637, a category that is much narrower than indecency. Likewise, *Ginsberg* only prohibited the direct commercial sale of magazines to minors, and did not ban any communications between adults. Indeed, the Court in *Ginsberg* specifically noted that the statute was "not invalid under our decision in *Butler*" because it "does not bar the appellant from stocking the magazines and selling them" to adults. 390 U.S. at 634-35. Finally, the statute in *Ginsberg* "[did] not bar parents who so desire from purchasing the magazines for their children," *id.* at 639. Under the CDA, by contrast, even parents may not utilize the Internet to transmit material that may be regarded as "indecent" to their children.

This Court's cases allowing cities to use zoning regulations to prevent "secondary effects" caused by adult bookstores and theaters also fail to support a lower level of scrutiny in this case. *See, e.g., Renton v. Playtime Theaters*, 475 U.S. 41 (1986); *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 75 (1976)(Powell, J., concurring). Unlike the CDA, zoning regulations impose only civil rather than criminal penalties for violation, and apply only to commercial businesses. In addition, zoning regulations do not (and constitutionally cannot) constitute a total ban. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981). Even zoning regulations are justified only if the targeted businesses have "negative secondary effects" in their surrounding communi-

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[19] (...continued)
tually limitless communications potential. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *Turner Broadcasting*, 114 S.Ct. at 2456-57; *Sable*, 492 U.S. at 127-28, *Bolger*, 462 U.S. at 74 (1983).

ties. *See, e.g., Renton v. Playtime Theaters*, 475 U.S. 41; *Young v. American Mini Theaters, Inc.*, 427 U.S. at 75. Contrary to the government's argument, the impact of speech is not a "secondary" effect. *See Boos v. Barry*, 485 U.S. 312 (1988)(regulation subject to strict scrutiny if it "focus[es] only on the content of the speech and the direct impact that speech has on its listeners"); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-36 (1992); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214-15 (1975); *Schneider v. New Jersey*, 308 U.S. 147, 162-63 (1939).

The government also suggests that the CDA is a regulation of "secondary effects" because the "government's interest in ensuring that parents are not deterred from allowing their children to use the Internet is directly analogous to the concerns about crime, reduced property value, and the quality of urban life that animated the cities in *Renton* and *Young*." Gov't Brief at 32. This newly coined interest was never articulated by Congress or the government below and there is absolutely no evidence in the record to support it. *See* Section II.B.3, *infra*. Even the much less draconian zoning regulations at issue in *Renton* and *Young* require that the government establish a record that the adult businesses *actually cause* secondary effects such as higher crime rates, injury to retail trade, and depression of property values.[20] *See Renton*, 475 U.S. at 48.

[20] Even if the government had presented actual evidence -- which it did not -- that some parents were deterred from using the Internet because of the presence of sexual material, this would certainly not justify a content-based, criminal ban on protected speech. If it did, controversial material currently available in libraries and bookstores could be banned simply because parents were fearful of its effects on their children -- which would amount to a permanent "fearful parents" veto on protected speech.

II. THE CDA FAILS STRICT SCRUTINY

Applying strict scrutiny, the trial court assumed that the government had a compelling interest in preventing at least younger minors from accessing some indecent materials. *But see* p.41, *infra*. Nevertheless, the trial court found that the CDA failed strict scrutiny in two separate and independent respects. First, because the CDA's defenses are completely unavailable for the vast majority of speakers, the trial court held that the CDA amounts to a criminal ban on constitutionally protected speech among adults. Almost by definition, such a result is not "narrowly tailored" to the government's purpose. Second, the trial court found that the CDA is a grossly ineffective method of achieving the government's interest and that substantially more effective and less restrictive methods exist.

A. The CDA Is Not Narrowly Tailored Because Its Defenses Are Unavailable For The Vast Majority Of Speakers On The Internet

1. The CDA Operates As A Flat Ban For All Speakers Using Newsgroups, Mail Exploders, Chat Rooms, And Commercial Online Services, And For All Noncommercial Speakers On The World Wide Web

The trial court found that "*no technology exists* which allows those posting on the category of newsgroups, mail exploder or chat rooms to screen for age. Speakers using those forms of communication cannot control who receives the communication." J.S. App. 74a (emphasis added)(Sloviter, J.); *id.* at 136a (The defenses are "unavailable to participants in specific forms of Internet communication")(Dalzell, J.). In addition, the trial court found that there was no technology available that would enable age verification by con-

tent providers on AOL, CompuServe and Prodigy. *Id.* at 51a, ¶96. Thus, the CDA would require the millions of people communicating by e-mail and mail exploders, all the people who send the 100,000 daily messages to USENET newsgroups, all the people carrying on conversations in chat rooms, and all the speakers who provide content through the large commercial online services, to reduce their speech to a level suitable for minors. *See* pp.13-14, *supra*. As to this universe of speakers, who even by themselves represent the overwhelming majority of speakers on the Internet, the CDA clearly fails strict scrutiny as a flat ban on indecency in violation of *Butler* and *Sable*.

The trial court also found that credit card verification is completely unavailable for the vast number of speakers on the Web who do not charge -- and do not wish to charge -- a fee for their information. Their finding was based on plaintiffs' unrebutted evidence that credit card companies will not verify cards in the absence of a commercial transaction. Steinhardt Test. Decl. ¶26; Anker Test. Decl. ¶21; Croneberger Test. Decl. ¶27; J.A. 122-23.

To require noncommercial speakers to begin to charge for their speech in order to verify age would violate the mission of many of the plaintiffs to provide free information. As Kiyoshi Kuromiya testified, "[c]ost should not be a barrier between . . . users and life-saving AIDS prevention and treatment information." J.A. 143-44. The cost would also put most of the plaintiffs out of business. As the trial court noted, "[i]f Critical Path must pay a fee every time a user initially enters its site . . . it would incur a monthly cost far beyond its modest resources." J.S. App. 54a, ¶100. Patricia Nell Warren testified that credit card screening on the YouthArts Web site would cost $9,000 for two days. Because YouthArts is produced entirely by volunteer labor,

and has no funding sources, the cost would be devastating.[21] Warren Test. Decl. ¶¶29-38. Barry Steinhardt testified that the ACLU would be forced to shut down its site if required to implement credit card screening. Steinhardt Test. Decl. ¶29-30; Steinhardt Testimony, Tr. Vol. III, at 173:7-21, 184:608, 185:7-17. All of these providers thus would have to steer clear of communicating potentially indecent speech even to adults.

2. The Burdens Of Age Verification For Content Providers On The World Wide Web Would Drive Many Speakers From The Marketplace

Based on uncontroverted evidence in the record, the trial court also found that the CDA would pose an unconstitutional burden on the narrow slice of speakers on the Internet for whom the defenses are not completely unavailable. Economic burdens on the exercise of protected speech are routinely struck down by the courts. Thus, in *Erznoznik v. City of Jacksonville*, 422 U.S. 205, this Court found an unconstitutional deterrent effect on free speech where, to avoid prosecution, theater owners were required either to "restrict their movie offerings or [to] construct adequate protective fencing which may be extremely expensive or even physically impracticable." *Id.* at 217. In *Simon & Schuster v. New York State Crime Victims Bd.*, this Court stated that "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech," because such a regula-

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[21] Ms. Warren testified that electronic magazines for young people have proliferated precisely because the cost of production is much lower, and the distribution much simpler, than for print media. Warren Test. Decl. ¶36; Warren Testimony, Tr. Vol. I, at 189:1-16.

tion "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." 502 U.S. at 115 & n.36.

The government acknowledges, at least, that "costs and burdens are not irrelevant" to the constitutionality of the CDA, Gov't Brief at 39, but it fails to apply strict scrutiny to analyze those burdens. Where a content-based regulation imposes criminal sanctions on protected speech, the question is not whether the burden "leaves open significant opportunities for adult-to-adult communication," *id.* at 39, but whether the law uses the *least restrictive means* to accomplish a compelling government interest. Moreover, after its grudging admission that economic burden is relevant, the government then attempts to minimize that burden by ignoring the factual findings. But the trial court clearly found that the burden of age verification would literally require many speakers to cease engaging in constitutionally protected speech, regardless of the age of the reader.

For example, the government argues that speakers who post indecent material on their Web sites "for commercial purposes can take advantage of the statutory defenses." *Id.* at 34. But the government fails to distinguish between commercial entities who actually sell information or products over the Internet and businesses who disseminate free information about their services or products. The Internet has allowed many small businesses to prosper precisely because they can provide information about their services for little or no money. The low entry barriers would be destroyed, thus silencing many speakers and reducing the breadth of diversity and information on the Internet, if these speakers were forced to charge for all of their speech. J.S. App. 131a-137a (Dalzell, J.).

In addition, far from the "modest burden" that the government suggests, Gov't Brief at 35, the trial court specifically found that the high cost of credit card verification would impose an unconstitutional burden on many commercial speakers. J.S. App. 53a-54a, ¶¶97-102. Thus, based on unrebutted evidence, the trial court found that "as a practical matter, noncommercial organizations and even many commercial organizations using the Web would find it prohibitively expensive and burdensome to engage in the methods . . . proposed by the government, and that even if they could attempt to age verify, there is little assurance that they could successfully filter out minors." *Id.* at 74a (Sloviter, J.); *id.* at 136a ("defenses either are not available to plaintiffs here or would impose excessive costs on them") (Dalzell, J.).

The government's argument that speakers on the Web can use adult verification services established by third parties also ignores the actual trial record. *See* p.15, *supra.* The government offered only hearsay evidence about third-party verification systems on the Web. One government witness testified that he "had no idea whether any of these adult verification systems would be feasible for nonprofit organizations that run largely or totally on volunteer labor." J.A. 116. The other testified that he had simply read the Web pages for these services, but did not know how third party verification systems actually obtained age verification. *Id.* at 122-23 ("How that referral technology works, I can't say right now"). Based on this record, the trial court concluded that the government failed to prove that third-party verification services provide an effective or practicable way for speakers on the Web to screen for age. J.S. App. 55-56a, ¶103-07.

Even if the record supported third-party verification as an economically viable option on the Web, the government ignores the substantial additional noneconomic burdens of such verification. This Court affirmed as recently as last Term that it is unconstitutional to require adults to "register"

in order to gain access to constitutionally protected speech. In *Denver Area*, the Court struck down the statutory requirement that viewers provide written notice to cable operators if they want access to certain sexually oriented programs because the requirement "restrict[s] viewing by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the 'patently offensive' channel." 116 S.Ct. at 2391. To require noncommercial speakers on the Web, under threat of criminal sanctions, to force their users to register with an unknown and possibly unreliable third party verification service is at least as onerous a burden on First Amendment rights as the scheme this Court found unconstitutional in *Denver Area*. *See also Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965)(finding unconstitutional a requirement that recipients of Communist literature notify the Post Office that they wish to receive it). A registration requirement would also prevent Americans from exercising their First Amendment right to engage in communication anonymously on the Internet. *See* J.S. App. 61a, ¶121; *McIntyre v. Ohio Elections Commission*, 514 U.S. __, __, 115 S.Ct. 1511, 1524 (1995).

3. The Government May Not Require Speakers To Switch To Another Form Of Communication

Implicitly acknowledging the factual weakness of its argument that speakers in mail exploders, newsgroups and chat rooms can avoid prosecution through the CDA's defenses, the government contends that these speakers can avoid criminal difficulties by shifting their conversation "to a Web site that is screened for age."[22] Gov't Brief at 37.

[22] There is no evidence in the record to support the government's sug- (continued...)

This argument illustrates a fundamental misunderstanding of the nature of these forums, which (unlike the World Wide Web) are characterized by spontaneous interactions, much like casual conversation. The government's suggestion is analogous to requiring a speaker chatting on a street corner, before saying a vulgar word or discussing sexual subjects, to stop mid-sentence, leave the corner, write down her thoughts, and have them published and sold at a bookstore that screens out minors. Even if a speaker chose to go through this tortured process rather than simply to remain silent, she would likely find it impossible to comply because, as discussed above, the vast majority of content providers on the Web also lack any method of screening for age.

More importantly, requiring speakers to switch to an alternative method of communicating is patently unconstitutional. In any event, "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Southeastern Promotions v. Conrad*, 420 U.S. 546, 556 (1975) (quoting *Schneider v. New Jersey*, 308 U.S. at 163).

4. Future Technology Cannot Save A Statute That Criminalizes Speech Today

Not surprisingly, the government has all but abandoned its argument that future technological developments, such as speaker-end tagging and screening, may provide a means for speakers to comply with the Act. *See* Gov't Brief at 38; *see* p.16, *supra*. As Judge Sloviter wrote, "I can imagine few arguments less likely to persuade a court to uphold a crimi-

[22] (...continued)
gestion that "chat rooms, newsgroups, and mailing lists can be established on a Web site." Gov't Brief at 37.

nal statute than one that depends on future technology." J.S. App. 82a (Sloviter, J.). The government's argument that tagging could constitute a "good faith defense" failed below because "there is no such technology" that allows speakers to tag their speech in a way that would ensure that minors were prevented from accessing it. *Id.* at 79a (Sloviter, J.). Conversely, industry continues to invent new ways to empower parents -- from the user end -- to control Internet content, illustrating that less restrictive alternatives to the CDA's draconian burdens are clearly available.

B. The CDA Fails Strict Scrutiny Because It Does Not Directly And Materially Advance The Government's Asserted Interest In Protecting Minors

1. The CDA Is Ineffective

The government fails to acknowledge another independent set of facts that were crucial to the trial court's conclusion that the CDA is not narrowly tailored. These facts show that even if the majority of speakers on the Internet could utilize the CDA's defenses -- and the factual record clearly establishes that they cannot -- the CDA would still fail to achieve the government's stated purpose of protecting minors. Because of the global nature of the online medium, even the CDA's total ban will be ineffective at ridding online networks of "indecent" material. Based on undisputed facts in the record, *see* pp.17-18, *supra*, the trial court concluded:

> [T]he CDA will almost certainly fail to accomplish the Government's interest in shielding children from pornography on the Internet. Nearly half of Internet communications originate outside the United States, and some percentage of that figure represents pornography. Pornography from, say, Amsterdam will be no less appealing to a child on the Internet than pornography from New York City, and residents of Amsterdam have little incentive to comply with the CDA.

J.S. App. 145a (Dalzell, J.).

Under strict (and even intermediate) scrutiny, a law "may not be sustained if it provides only ineffective or remote support for the government's purpose." *Central Hudson Gas & Elec. Corp. v. PSC*, 447 U.S. 557, 564 (1980). The government bears the burden of showing that its scheme will "in fact alleviate . . . the alleged harms in a direct and material way." *Turner Broadcasting*, 114 S.Ct. at 2470. As Justice Scalia wrote in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), "a law cannot be regarded as . . . justifying a restriction upon truthful speech, when it leaves appreciable damage to [the government's] supposedly vital interest unprohibited." *Id.* at 541-42 (Scalia, J., concurring)(holding that Florida law prohibiting disclosure of rape victims' names in "any instrument of mass communication" but not by other means did not directly and substantially further the law's stated purpose).[23] Because the CDA is a strikingly ineffective tool for achieving the government's interest, it fails strict scrutiny.

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[23] *See also Denver Area*, 116 S.Ct. at 2416 ("Partial service of a compelling interest is not narrow tailoring")(Kennedy & Ginsburg, JJ., concurring in part and dissenting in part); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 104-05 (1979)(invalidating law making it a crime for newspapers, but not electronic media, to publish the names of juvenile offenders); *Bolger*, 463 U.S. at 73 (restriction that "provides only the most limited incremental support for the interest asserted" cannot survive scrutiny under commercial speech standards).

2. Other, More Effective Means Exist To Empower Parents And Users

The government also defends the CDA's criminal ban on adult speech on the grounds that there are no "equally effective" alternatives. First, that argument misstates the relevant legal test. It is always true that only an "absolute ban" on adult speech "can offer certain protection against assault by a determined child." *Denver Area*, 116 S.Ct. at 2393. But the Court has repeatedly rejected the notion that the First Amendment rights of adults can be sacrificed to achieve that certainty, especially when less restrictive alternatives exist. *Id.* (and cases cited therein).

Second, the government's argument ignores the strong factual record regarding the numerous alternatives available to parents, which came from the government's own stipulations at trial. Focusing only on user-end software programs, the government suggests that the trial court did not find them to be "currently effective." Gov't Brief at 41. To the contrary, the trial court found that the existing software affords parents a significant option for protecting children. J.S. App. 146a (Dalzell, J.).

In addition, the government itself agreed that "[t]he market for this type of software is growing, and there is increasing competition among software providers to provide products." *Id.* at 35a; *see also id.* at 35a-41a. Unlike the CDA, these software programs *are* effective at controlling sexually oriented material originating from foreign sites. *See* p.18, *supra*. The government's brief also completely ignores the additional protections available through the major commercial online services -- AOL, Microsoft Network, CompuServe and Prodigy -- all of which "offer parental control options free of charge to their members." *Id.* at 41a-42a; *see* p.18, *supra*. Additionally, it ignores its own stipulations regarding the Platform for Internet Content Selection

(PICS), a coalition of major online service providers and computer companies that are developing standards to facilitate user-based blocking. *Id.* at 32a-35a.[24]

The government is always free to further its interests by educating the public about the "benefits and dangers of this new medium." *Id.* at 146a (Dalzell, J.). As this Court noted in *Denver Area*, "informational requirements" and user-based blocking are more narrowly tailored than speaker-based schemes as a means of limiting minors' access to patently offensive material. 116 S.Ct. at 2393. *See also* Title V, Subtitle C, Pub.L.No. 104-104, §552(1), 110 Stat. 142 (encouraging the establishment of a "technology fund" to support the development of user-based blocking technology and public education).

3. The CDA Is Not Narrowly Tailored To Address The Government's Newly Asserted Interest In Promoting Use Of The Internet

Without any support in the record, the government on appeal coins a separate, independent interest in the CDA --

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[24] Some *amici* suggest that teenagers are more adept with computers than adults, Brief of *Amici* Morality in Media at 23; Brief of *Amici* Enough is Enough at 20, although no evidence on this issue was presented to the trial court. This suggestion, even if true, would only be relevant if parents could not turn on blocking software or if minors could disable it. But the record showed that parental control options are no more difficult to enable than a bank ATM card, and are just as difficult to disable. Duvall Test. Decl. at 6-8, ¶¶13-16. As this Court has said, "[n]o provision . . . short of an absolute ban, can offer certain protection against assault by a determined child. We have not, however, generally allowed this fact alone to justify 'reduc[ing] the adult population . . . to . . . only what is fit for children.'" *Denver Area*, 116 S.Ct. at 2393 (citations omitted).

it suggests that "[u]nless steps are taken to restrict the availability of such material to children, parents . . . may be deterred from bringing the Internet into their homes at all." Gov't Brief at 30. The government introduced no evidence at trial to support this assertion, and the trial court was not asked to make any findings on this point. Under strict scrutiny, this Court should consider only those interests identified by the government below and considered by the trial court. *See Holly Farms Corp. v. NLRB*, 517 U.S. __, 116 S.Ct. 1396, 1402 n.7 (1996).

Even if consideration of this newly asserted interest were proper, it is contradicted by the record. Far from showing that parents have been deterred from using the Internet, the facts establish that the Internet is expanding at an exponential rate, and that the number of users -- including minors -- continues to grow. J.S. App. 13a, ¶3. Further, there is no legal support for the government's proposition that its interest is "compelling," or that the CDA would be a narrowly tailored means of achieving the interest. Indeed, "indecent" materials are widely available in public libraries, and yet, it is doubtful that the government would attempt to justify a flat ban on indecency in libraries under the rationale that parents would otherwise refuse to allow their children into them. As discussed above, user-based screening technologies and public education are a far more narrowly tailored means of addressing any parental concern over sexually oriented content on the Internet than a criminal ban which prohibits adults from gaining access to constitutionally protected speech.

III. THE CDA IS SUBSTANTIALLY OVERBROAD AND CANNOT BE NARROWLY CONSTRUED

The government continues to suggest that the CDA must be upheld because, in theory, it could be applied to some speakers without violating the Constitution. Gov't Brief at 34. But, as the trial court held, a law must be struck down as facially invalid "if it would 'penalize a substantial amount of speech that is constitutionally protected' . . . . even if some applications would be 'constitutionally unobjectionable.'" J.S. App 106a (Dalzell, J.)(citing *Forsyth County v. Nationalist Movement*, 505 U.S. at 129). *See also Shea*, 930 F.Supp. at 950 (holding that the CDA is substantially overbroad because "the set of content providers whose speech could be constitutionally proscribed is in fact exceeded, perhaps even overshadowed, by the number of users whose speech is constitutionally protected").

The doctrine of substantial overbreadth arose to permit facial challenges to laws that might have some permissible applications but that threaten a substantial quantity of constitutionally protected speech. *E.g., Brockett v. Spokane Arcades*, 472 U.S. 491, 504 (1985). This is particularly the case where, as with the CDA, the law regulating speech is criminal in nature. *See, e.g., Houston v. Hill*, 482 U.S. 451, 459 (1987).

As discussed above, the facts firmly establish that the CDA operates unconstitutionally for the overwhelming majority of online speakers -- speakers who communicate through mail exploders, newsgroups, chat rooms, and on the Web, and who either *have no available technology* for screening minors from their audience or who could not shoulder the economic and other unconstitutional burdens of compliance. *See* Section II.A, *supra*. To cure this obvious overbreadth, the government suggests that the trial court should have upheld §223(d)'s display provision at least to

the extent that it applies to commercial Web sites. Gov't Brief at 34. But even that application suppresses a substantial amount of protected speech. All the commercial speakers who provide content through AOL, CompuServe, and Prodigy, and all the commercial speakers who use the Web for communications other than the actual sale of services or products, lack the ability to verify the age of their users. J.S. App. 51a, ¶96.

Even if the CDA could be applied constitutionally to commercial Web sites, which it cannot, such a narrowing construction would contradict the CDA's clear legislative purpose. The trial court in this case and in *Shea* correctly declined to perform such "radical surgery." 930 F.Supp. at 923. As Judge Sloviter wrote: "It is clear from the face of the CDA and from its legislative history that Congress did not intend to limit its application to commercial purveyors of pornography." J.S. App. 75a; *see also* H.R. Conf.Rep. No. 458, 104th Cong., 2d Sess. 113, 191 (1996)(Conf.Rep). Among other things, Congress intentionally banned material under the CDA that *lacks* prurient appeal and that *has* serious value. In addition, given the explicit application of the statute to libraries and educational institutions, *see* §§230(e)(2) and 223(f)(a), the government's suggestion would require more than creative redrafting. The *Shea* court similarly declined the invitation "to usurp Congress' legislative functions" with an interpretation that "fl[ies] in the face of a clear congressional intent to apply the statute's proscriptions to commercial and non-commercial content providers alike." 930 F.Supp. at 949-50.

In a final effort to persuade the Court to ignore the well-established rules of overbreadth and uphold the CDA as applied to commercial Web sites, the government cites the CDA's severability clause. *See* Gov't Brief at 45-48. If Congress could avoid the precision the Constitution requires when First Amendment rights are at stake simply by including a severability clause, it could always "set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the Judicial for the Legislative Department of the government." *United States v. Reese*, 92 U.S. 214, 221 (1875). This Court has rejected that approach for more than a century.

The government also fails completely to address the serious overbreadth problems posed by the CDA's broad ban of material that is constitutionally protected for minors. "Indecency" embraces a much broader category of speech than the "harmful to minors" standard articulated in *Ginsberg*. Plaintiffs presented substantial evidence that the CDA's "indecency" standard will bar a vast quantity of material on the Internet that is *valuable* to minors, especially older adolescents. J.S. App. 71a (Sloviter, J.). *See also* J.A. 140 ¶¶16-17; 142-43 ¶22.

According to a March, 1996 report of the President's Office of National AIDS policy, one quarter of all new HIV infections in the U.S. are estimated to occur in young people between the ages of 13 and 20. J.A. 142, ¶22. *See also* U.S. Dep't of Commerce, Bureau of the Census, *School Enrollment -- Social and Economic Characters of Students: October 1992*, table 1 (Oct. 1993)(123,000 people under age 18 are enrolled in college, 117,000 of them as freshmen); Alan Guttmacher Institute, *Sex and America's Teenagers* 19 (1994)(In 1994, more than half of teenage females and almost three quarters of teenage males had been sexually active before their 18th birthday). In the face of these realities about today's youth, the government is hard-pressed to demonstrate that it has a compelling justification for barring older minors from access to explicit safer sex information or other communications that may help them deal with the onset of sexuality.

IV. The CDA Is Unconstitutionally Vague

Although plaintiffs recognize that some members of this Court have upheld the "indecency" standard against vagueness challenges in other contexts, *see Denver Area*, at least three distinguishing factors support Judge Sloviter's and Judge Buckwalter's conclusion that, when applied to the global Internet, "indecency" is hopelessly vague.

First, and crucially, "the CDA attempts to regulate protected speech through criminal sanctions, thus implicating not only the First but also the Fifth Amendment of our Constitution." J.S. App. 88a (Buckwalter, J.). As this Court has stated, criminal statutes should be scrutinized with extreme care for clarity because "'[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes,'" and this is particularly true of laws "'having a potentially inhibiting effect on speech . . . .'" *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976)(quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939), and *Smith v. California*, 361 U.S. 147, 151 (1959)).

The CDA puts millions of ordinary citizens -- not media giants with staff counsel -- at risk of criminal prosecution merely for communicating in possibly "offensive" terms online. Online communications through newsgroups, chat rooms, and mail exploders are often as fleeting as conversations on a street corner. And yet the CDA requires all of these speakers to determine, before they speak, whether their statements are "patently offensive." Given the uncertainty of that judgment, there is no doubt that many of these online speakers will choose to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

Second, the government's own inability to define consistently the speech rendered criminal by the CDA dramatically illustrates just how freewheeling the subjective, discretionary judgments of police and prosecutors under the CDA would be.[25] At trial, Special Agent Schmidt, a federal law enforcement officer, opined that an extremely explicit safer sex illustration of how to put a condom on an erect penis would not be subject to prosecution because its "context" was educational, not "purely for pleasure purposes." Schmidt Testimony, Tr. Vol. IV, at 137:5-138:19. By contrast, the much less explicit photo of pregnant actress Demi Moore on the cover of *Vanity Fair* magazine would be illegal if published on the Internet, according to this experienced federal law enforcement officer, because the "context" was not primarily educational, but was "fun, basically . . . for fun more than anything else." J.A. 119. Dr. Dan Olsen, the government's computer expert, testified that any of the "seven dirty words" made famous by the *Pacifica* decision, or their synonyms, would be covered. *Id.* at 127-28. Yet, the government and some *amici* continue to insist that the CDA encompasses only commercial pornography, a term without legal significance. *See* Gov't Brief at 34-35; Brief

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[25] The defenses, far from resolving the CDA's vagueness, fail to provide speakers with any clear guidelines about how to avoid prosecution. *See Shea*, 930 F.Supp. at 943-44, in which John C. Keeney, Acting Assistant Attorney General of the Criminal Division of the Department of Justice, advised in a letter to the court that tagging would be "substantial evidence" in support of a "good faith" defense. As Judge Dalzell noted, "[i]t is . . . an unanswered question whether the Keeney letter would eliminate any of the CDA's chill, since the Government acknowledged that the letter would not prohibit a United States Attorney from taking a contrary position in a particular prosecution." J.S. App. 133a-134a, n.20.

for *Amici* Enough is Enough at 7.[26]

Amici and the government also offer inconsistent opinions about the meaning of the CDA's terms. For example, the conference report stated that the CDA is intended to have "the same meaning as established in *FCC v. Pacifica* and *Sable Communications of California*." Conf.Rep. at 188 (citations omitted). But some of these same members of Congress now assert as *amici* that "[o]nline indecency was not intended and should not be held to have the same scope as broadcast indecency," and that the two standards "differ markedly." Brief of *Amici* Senators Dan Coats, James Exon, *et al.*, at 7 (Cong. Brief). The executive branch has not clarified the legislative branch's confusion, and the Court is left to decide if prior indecency cases are even relevant.

Amici and the government also offer inconsistent opinions about whether indecency excludes material of value and whether value is to be measured for adults or minors. In an interpretive about-face, the congressional *amici* now suggest that "indecency considers serious value for adults as well as minors," *id.* at 13, and "does not reach serious expression that should be protected for adults."[27] *Id.* at 2. But the

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[26] The government did not seriously contest the standing of the plaintiffs in this case. *See* n.11, *supra*. Even more dramatically, the government did not contest standing in *Shea*, which involved a single magazine article using strong language as part of a political attack on the CDA itself. 930 F.Supp. at 923.

[27] *Amici*'s suggestion that "indecency" excludes material with serious value is also contradicted by the case law. For example, the satiric comic monologue at issue in *Pacifica* could hardly be said to lack *any* artistic or political value. *Pacifica*, 438 U.S. at 751; *see also id.* at 741 n.16 (scenes from LADY CHATTERLEY'S LOVER, though constitutionally protected, would raise serious "indecency" concerns if broadcast); *United* (continued...)

conferees *explicitly rejected* a "serious value for minors" exemption when they voted *against* the "harmful-to-minors" standard.[28] *See* Conf.Rep. at 189; *see also* 142 Cong. Rec. H1166 (daily ed. Feb. 1, 1996)(statement of Rep. Berman).[29]

Finally, the CDA is unconstitutionally vague because it fails to define the relevant "community" that will set the standard for what is "indecent" on the global Internet. *See* J.S. App. 96a-98a (Buckwalter, J.). While the Conference Report states that the CDA is meant "to establish a uniform national standard of content regulation," Conf.Rep. at 191, the government below suggested that local community standards would apply. *See* J.S. App. 96a-97a (Buckwalter, J.); J.A. 119. Even if one assumes that local standards apply, speakers have no way of determining which local com-

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[27] (...continued)
States v. Evergreen Media Corp., 832 F.Supp. 1183 (N.D.Ill. 1993) (broadcast talk shows containing sexual innuendo); *KSD-FM*, Notice of Apparent Liability, 6 FCC Rcd. 3689 (1990)(news story about a highly publicized alleged rape).

[28] The government's and *amici*'s reliance on the phrase "in context" exacerbates rather than resolves the vagueness of the CDA. *See* Gov't Brief at 43-44; Cong. Brief at 14. A speaker on the World Wide Web has no control over the "context" in which his speech is viewed; the material is simultaneously presented in potentially thousands of different "contexts" through the *ad hoc* linking feature of the Web. *See* J.S. App. 117a n.11 (Dalzell, J.).

[29] In response to the government's argument that it would not prosecute "works of serious literary or artistic merit," Judge Sloviter wrote: "[It] would require a broad trust indeed from a generation of judges not far removed from the attacks on James Joyce's ULYSSES as obscene . . . . The bottom line is that the First Amendment should not be interpreted to require us to entrust the protection it affords to the judgment of prosecutors." J.S. App. 82a-83a.

munity provides the relevant standard. The facts at trial showed that online communications are accessible virtually anywhere regardless of their "community" of origin, and online speakers have no way to determine the geographic origin of the persons who access their speech. J.S. App. 47a-48a, ¶¶85-86. In order to protect themselves from prosecution, then, all Internet speakers would have to conform to the standards of the least tolerant community in the United States -- a result that this Court explicitly rejected in *Miller v. California*, 413 U.S. 15, 33 (1973)("People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity").

V. ALL THREE CHALLENGED PROVISIONS ARE UNCONSTITUTIONAL

In an effort to hide the unconstitutionality of all of the CDA's provisions, the government creates a smokescreen by attempting to distinguish §223(a)(1)(B) and §223(d)(1)(A) from §223(d)(1)(B). Gov't. Brief at 24-27. For several reasons, this smokescreen should not divert the Court. Most significantly, the government did not present the argument below. *See Holly Farms Corp. v. NLRB*, 116 S.Ct. at 1402 n.7 (declining to entertain argument that petitioners had failed to advance previously, because the Court "generally do[es] not address arguments that were not the basis for the decision below")(quoting *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. __, 116 S.Ct. 873 n.5 (1996)).

The government's effort to draw distinctions between the challenged provisions of the CDA also lacks support under a fair reading of the statute. Congress clearly applied the "safe harbor" defenses of §223(e)(5) to all three provisions of the CDA.[30] If §223(a)(1)(B) and §223(d)(1)(A) were meant to apply only to persons who intentionally communicated indecent or patently offensive material to a particular person they knew to be a minor, it would be nonsensical for such speakers to be able to assert §223(e)(5)(A)'s "good faith" defense, or §223(e)(5)(B)'s "verified credit card" defense, to avoid prosecution. Thus, the government's interpretation is unpersuasive.

Finally, the government's attempt to define the non-display provisions narrowly has been unclear and inconsistent. In its Jurisdictional Statement, the government suggested for the first time that §223(a)(1)(B) "applies only in situations in which a person transmits indecent material to another person, knowing that person is under 18." Jurisdictional Statement at 20. In their response, the ALA Plaintiffs interpreted the government's new definition to mean that the provisions applied "only when the *only* recipient of a communication is known to be a minor." ALA Response at 25. But the government then flatly contradicted that understanding, stating:

> [W]e do not interpret Sections 223(a)(1)(B) and 223 (d)(1)(A) as reaching only those situations in which the sender knows that the *only* persons receiving an indecent message are minors. *Those Sections also apply when a sender transmits a message to more than one recipient, knowing that at least one of the specific persons receiving the message is a minor.*

Opposition to Motion to Affirm, at 4 n.1 (second emphasis added). Under this interpretation, the non-display provisions

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[30] Section 223(e)(5) provides "a defense to a prosecution *under subsection (a)(1)(B) or (d)*" (emphasis added).

clearly violate *Butler* because, as discussed above, adults communicating by mail exploders, newsgroups and chat rooms have no way to prevent their messages from being distributed to the minors in these forums while continuing to communicate with the adults.

The government's brief on the merits is more ambiguous than its brief in opposition about when the provisions would apply. Now, the government says that the provisions "appl[y] only in situations in which a person transmits indecent material to another person, knowing that person is under 18." Gov't Brief at 24. By way of supposed clarification, the government then offers an example to support the argument that the non-display provisions do not affect adult-to-adult communications: "[I]f an adult learned that one of the participants in a chat room was under 18, and then sent a private indecent communication to that individual by e-mail, the transmission provision would be violated." *Id.* Their example fails to note that the non-display provisions, under their previous interpretation, would force all of the adults in the chat room to censor themselves until they knew with certainty that the minor had left. The government's example also leaves totally unclear the status of newsgroups and mail exploders. For example, if a speaker in the Safer Sex Forum read a posting by someone who identified herself as a minor, does that speaker have to refrain from "indecent" speech when she posts her next message to the Forum? The government's ambiguous interpretation leaves this, like many of the real world applications of the CDA, unclear and unconstitutionally vague.

CONCLUSION

For the reasons stated above, the judgment of the three-judge district court preliminarily enjoining enforcement of the CDA should be affirmed.

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Dated: February 20, 1997

Supreme Court, U.S.
FILED
MAR 7 1997
CLERK

No. 96-511

In the Supreme Court of the United States

OCTOBER TERM, 1996

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., APPELLANTS

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR THE APPELLANTS

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REPLY BRIEF FOR THE APPELLANTS

As we argue in our opening brief, the "transmission" (47 U.S.C. 223(a)(1)(B)), "specific child" (47 U.S.C. 223(d)(1)(A)), and "display" (47 U.S.C. 223(d)(1)(B)) provisions of the Communications Decency Act of 1996 (CDA) (Pub. L. No. 104-104, 110 Stat. 133) are facially constitutional. All three provisions constitutionally advance two overriding government interests: protecting children from the harmful effects of sexually explicit patently offensive communications, and facilitating the First Amendment interest of parents and children in using the Internet and other interactive computer services.

1. a. Appellees devote very little effort to defending the district court's invalidation of the transmission and specific child provisions. Instead, appellees argue (ALA Br. 46; ACLU Br. 46) that the Court should not consider the government's arguments on those provisions because the government did not argue below that they have a narrower scope than the display provision. In fact, however, the government made the same argument in the district court that it is making now, except in abbreviated form. U.S. Opp. to Mot. to Aff. 3.

In any event, in framing the questions presented for review by this Court, the government was not required to limit itself to the precise arguments made below. *Yee* v. *City of Escondido*, 503 U.S. 519, 534-535 (1992). In our jurisdictional statement, we presented a separate question concerning the validity of each provision, and we argued that the transmission and specific child provisions are narrower than the display provision and easily survive constitutional analysis. J.S. I, 20-21. We reiterated that argument in our opposition to the motion to affirm (at 2-4). That argument is therefore properly before the Court.

b. Appellees contend (ALA Br. 44; ACLU Br. 47) that we have not made clear whether the transmission and specific child provisions are limited to situations in which

the sender knows that the *only* persons receiving the communication are under 18, or whether those provisions also apply when the sender knows that at least one of the recipients is under 18. In our opposition to the motion to affirm (at 4 n.1), however, we explained that the provisions apply to both situations. We have never suggested otherwise.

c. ACLU contends (Br. 47) that Congress could not have intended to limit the transmission and specific child provisions to situations in which the sender knows that a particular recipient is a minor, because the statutory defenses apply to those provisions, and it would be "nonsensical" to permit someone who committed such a knowing violation to assert a "good faith" or "verified credit card" defense. Section 223(e)(5), however, establishes a "defense to prosecution," and Congress reasonably could have decided to add an additional layer of protection in order to relieve persons without the relevant knowledge from having to litigate that issue. Thus, if a speaker sends an indecent message to a minor, and the speaker can show that the minor used a verified credit card, the speaker will not be required to litigate the question of whether he knew that the recipient was a minor. There is nothing "nonsensical" about that approach. In any event, ACLU's concerns do not provide any basis for ignoring the text of the transmission and specific child provisions, both of which clearly impose a knowledge requirement.

d. Appellees contend (ALA Br. 44-45; ACLU Br. 47-48) that, even when the transmission and specific child provisions are construed in the manner we have suggested, they are facially unconstitutional. That contention is without merit.

As we explain in our opening brief (at 19-20), *Ginsberg* v. *New York*, 390 U.S. 629 (1968), and *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), establish that there is no First Amendment right to disseminate indecent material

to children. As applied to situations in which the sender knows that the only recipients are children, the transmission and specific child provisions are indistinguishable from the prohibition on the sale of indecent material to children upheld in *Ginsberg* and are therefore clearly constitutional.

The transmission and specific child provisions are also constitutional as applied to situations in which a person disseminates information to a group, knowing that at least one of the members of the group is a minor. Requiring someone to refrain from disseminating an indecent communication to such a mixed group does not significantly burden adult-to-adult communications. For example, if a person who wants to transmit an indecent communication learns that one of the persons in a chat group is under 18, he can simply tell the child to leave the chat room and wait for the child to sign off, or he can invite the adults to another chat room.

In daily life, adults having a sexually explicit conversation ordinarily would not think of continuing the conversation when a child walked into the room and could overhear what was being said. Instead, the child would be told to leave the room, or the adults would arrange to have the conversation at a different place or a different time. The transmission and specific child provisions do nothing more than require adults to exercise that same degree of responsibility when they use the Internet.

2. As we argue in our opening brief (at 28-33), the display provision is constitutional under the principles established in *Pacifica* and *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986). Those cases hold that, in limited circumstances, government may adopt reasonable time, place, or manner restrictions that apply exclusively to indecent content. *Pacifica* holds that such restrictions are permissible when indecent communications pervasively invade the home; *Renton* holds that such restric-

tions are permissible when they are aimed at the secondary effects of indecent communications. Both justifications are present here.[1]

a. Appellees contend (ALA Br. 26-27; ACLU Br. 24) that *Pacifica* is distinguishable because its approval of the FCC's approach depended on the likelihood that persons would chance upon indecent broadcasts inadvertently. There is a significant danger of inadvertent exposure to indecent material on the Internet as well.[2] More significant, however, the danger of inadvertent exposure was not a necessary element of the decision in *Pacifica*. The FCC relied on that factor only because one reason for its restriction was the protection of unconsenting *adults*. 438 U.S. at 731 n.2. The principal reason for the restriction in *Pacifica* was the FCC's "special concern" that "children have access to radios and in many cases are unsupervised by parents." *Ibid.* That concern for unsupervised access exists regardless of whether children inadvertently stumble upon indecent material or deliberately search for it. The lesson of *Pacifica* is that when the danger that

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[1] In general, time, place, or manner restrictions that address speech on the basis of content are subject to strict scrutiny. *Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 530, 536 (1980). *Pacifica* and *Renton* create narrow exceptions to that general principle. Because the display provision is constitutional under *Pacifica* and *Renton*, it need not be subjected to strict scrutiny. In any event, for the reasons set forth here and in our opening brief, the display provision is narrowly tailored to further two compelling interests. Thus, even if strict scrutiny were applicable, the display provision would be facially constitutional.

[2] See Linton Weeks, *A Safety Net For Children*, Wash. Post, Feb. 27, 1997, at B1 (noting that while the search term "eruption" recovered sites containing valuable information on the earth's crust, its first retrievable site was titled "Eruption" and promised "all nude" sex, "[a]ll presented in a manner designed to ensure your eruption"); see also Gov't Br. 29 ("Jasmine," "Sleeping Beauty," and "Little Women" retrieved long lists of sexually explicit sites).

children will obtain access to indecent material becomes sufficiently serious, government may channel the indecent communications so as to minimize the risk that children will be exposed.

The danger that unsupervised children will obtain access to indecent material is especially acute on the Internet. As we explain in our opening brief (at 28-29), the amount of indecent material on the Internet is staggering, and many children have a strong proclivity to seek it out. Moreover, it may even be more difficult to supervise a child's Internet use than his television use. Because of its educational importance, many parents may want their children to use the Internet for significant periods of time, including when the parents are away; a computer may often be located in a child's bedroom, making effective monitoring more difficult; and even parents who check which television shows their children are watching may simply not have the time or patience to watch their children conduct extended Internet searches. Thus, in many ways, there is even a stronger justification for the display provision than for the restriction upheld in *Pacifica*.

b. Appellees' attempt to distinguish *Renton* is also unsuccessful. Appellees contend (ALA Br. 28; ACLU Br. 25-26) that the effect of patently offensive communications on children is a primary rather than a secondary effect. The primary effect of constitutionally protected adult-to-adult communication, however, is on adults. The harm to children is a secondary, spillover effect of that constitutionally protected adult-to-adult expression. See *American Booksellers* v. *Webb*, 919 F.2d 1493, 1502 n.16 (11th Cir. 1990) (identifying harm to children from display of sexually explicit magazines in retail stores as secondary effect that justified requirement that stores put magazines in opaque wrappers), cert. denied, 500 U.S. 942 (1991); see also *Upper Midwest Booksellers Ass'n.* v. *City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1986) (upholding wrapper

law as reasonable time, place, and manner restriction); *M.S. News Co.* v. *Casado*, 721 F.2d 1281 (10th Cir. 1983) (same).

Appellees' reliance (ALA Br. 28) on *Boos* v. *Barry*, 485 U.S. 312 (1988), is misplaced. There, the Court stated that "[r]egulations that focus on the direct impact of speech on its audience" cannot be justified under *Renton*. *Id.* at 321. Because there is no constitutionally protected right to disseminate indecent material to children, the relevant "audience" here consists entirely of adults. Thus, while a law premised on the view that indecent material causes psychological damage to adults could not be justified under *Renton*, a law premised on the view that such material harms children can be.

As we explain in our opening brief (at 30-31), the display provision is also addressed to the danger that parents will be deterred from bringing the Internet into their homes because of concern for their children. That danger is one step further removed from the impact of the communications on adults and is even more clearly a secondary effect.

3. Appellees contend (ALA Br. 14-25; ACLU Br. 21-22) that the display provision is not a time, place, or manner restriction, but is instead an absolute ban on constitutionally protected adult-to-adult communication. The display provision, however, does not legally prohibit the dissemination of indecent communications to adults. It prohibits only those communications that are displayed "in a manner available to a person under 18 years of age," 47 U.S.C. 223(d)(1)(B), and it establishes a defense to prosecution for persons who restrict minors' access to their indecent postings through a credit card, adult identification number, or any other effective means, 47 U.S.C. 223(e)(5). The display provision therefore expressly *permits* adults to disseminate indecent material to other adults. It limits only the place and manner in which indecent material may be communicated.

a. Appellees nonetheless contend (ALA Br. 16-21) that the display provision should be regarded as an absolute ban because of the technical difficulties of screening children from certain areas of the Internet and because of the costs and burdens associated with screening children from others. This Court has never treated a regulation that legally permits adult-to-adult indecent communication as a ban. All three cases relied upon by appellees involved legal prohibitions against the dissemination of information to adults. *Sable Communications* v. *FCC*, 492 U.S. 115 (1989); *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983); *Butler* v. *Michigan*, 352 U.S. 380 (1957). To accept appellees' contention that the display provision constitutes a ban on protected speech would require a dramatic extension of those cases.[3]

It may be reasonable to equate technological impossibility with a ban. But appellees' contention that the costs and burdens of utilizing means that are technically feasible transform a time, place, or manner restriction into a ban eliminates any distinction between flat ban and other restrictions on constitutionally protected speech: The costs and burdens of complying with a time, place, or

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[3] Appellees also contend (ACLU Br. 21-22) that a ban on indecent speech is per se unconstitutional. The three cases relied upon by appellees do not support that contention. In each of those cases, there was an alternative to a ban that would have effectively served the government's interest. *Sable*, 492 U.S. at 128-130 (ban on dissemination of indecent messages held unconstitutional when credit card, access code, and scrambling rules would be effective in protecting children); *Bolger*, 463 U.S. at 73 (ban on use of mail to send unsolicited advertisements for contraceptive products held unconstitutional when parents could either prevent such information from reaching their mailboxes or could exert sufficient control of what entered their mail boxes to prevent unwanted mailings from reaching children); *Butler*, 352 U.S. at 383 (ban on sale to adults of books deemed harmful to children held unconstitutional when prohibition on sale of such books to children would satisfy State's interest).

manner restriction will almost always cause some persons to refrain from speaking. What distinguishes a ban from other speech-related regulations is the certainty and universality of its effect. See *Denver Area Educ. Telecommunications Consortium* v. *FCC*, 116 S. Ct. 2374, 2387 (1996) (noting that a distinguishing feature of a governmental ban is its "certainty"). In assessing whether the display provision is the equivalent of a ban, the relevant inquiry should therefore be whether there are technically feasible means for adult-to-adult communication, not whether the use of available technology to screen children entails burdens and costs that deter some or even many from speaking.

That distinction is supported by *Renton*. There, the Court upheld a zoning scheme that restricted the places in which adult theaters could locate. While more than 5% of the land in the city was technically available for the opening of adult theaters, the theater operators asserted that none of the existing sites were "commercially viable." 475 U.S. at 52. The Court rejected the operators' contention that the zoning scheme therefore effectively operated as a ban on speech, relying in part on Justice Powell's observation in *Young* v. *American Mini Theatres*, 427 U.S. 50, 78 (1976) (concurring opinion), that "[t]he inquiry for First Amendment purposes is not concerned with economic impact." *Renton*, 475 U.S. at 54.

Appellees argue (ALA Br. 23) that a restriction should be viewed as a ban unless, as a practical matter, speakers can reach the audience they want to reach at the time they want to reach it. That view cannot be squared with *Pacifica* or *Renton*. As a practical matter, programmers who are limited to late-night hours are unlikely to obtain the same audience they could obtain during prime time, and adult theaters that locate miles away from residential areas may not attract the same audience they would if they were closer. That kind of practical consequence does

not transform a time, place, or manner restriction into a ban. In general, speakers are entitled to no more than a reasonable opportunity to reach their intended audience.

b. Appellees concede (ALA Br. 18) that it is technologically possible for speakers to screen for age on the World Wide Web. Under the correct legal standard, that concession is sufficient to dispose of appellees' contention that the display provision is the equivalent of a ban on adult-to-adult communication of indecency. The Web affords almost unlimited opportunities for those who are so inclined to disseminate and receive patently offensive communications. And with the use of available screening technologies, all but the most determined children can be prevented from obtaining access to that material.[4]

ALA contends (Br. 23) that chat rooms, newsgroups, and mail exploders (none of which had been developed on the Web at the time of the preliminary injunction (PI) hearing) involve distinctive forms of communication. But ALA does not identify what makes those forms of communication so distinctive that communication through the Web (as it existed at the time of the PI hearing) would not largely serve the same purpose. ACLU asserts (Br. 33) that telling someone who is in a chat room that she must switch to the Web before disseminating patently offensive

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[4] ALA's assertion (Br. 18) that AOL subscribers cannot screen for age on the Web sites made available to them is somewhat misleading. While AOL subscribers would have to establish a site through a different server in order to screen for age, AOL subscribers can obtain *access* to *all* Web sites through AOL (including those that screen for age). ACLU's contention (Br. 28) that the display provision operates as a ban on persons who want to put content on AOL sites reflects a misuse of the term "ban." Such persons can simply establish a Web site through a different service provider—or AOL itself could conform its Web-posting software to that used by many others. By ACLU's logic, the FCC policy in *Pacifica* was a "ban" on broadcasting indecent material and the ordinance in *Renton* was a "ban" on adult theaters.

material "is analogous to requiring a speaker chatting on a street corner, before [communicating indecency], to stop mid-sentence, leave the corner, write down her thoughts, and have them published and sold at a bookstore that screens out minors." Once a person has established a Web site that screens for age, however, our proposed "chat room to Web site switch" is much more analogous to an adult talking to members of the public on a street corner, starting to discuss the latest X-rated movie in graphic terms, noticing that children may overhear the conversation, and then asking the group to accompany her across the street so that she can complete her thoughts outside the presence of children.

Moreover, appellees' concerns about the inability to engage in "distinctive" forms of communication have largely become moot since the time of the PI hearing. As we explain in our opening brief (at 37-38 & n.10), since the time of that hearing, chat rooms and newsgroups have begun to proliferate *on the Web*. A recent Newsweek article documents that trend. Katie Hafner, *Look Who's Talking*, Newsweek, Feb. 17, 1997, at 70-72.[5] While appel-

[5] Among others, Newsweek lists the following chat rooms and discussion groups:

(1) www.chat.yahoo.com: "Its approach is to center chat on the categories in the directory."

(2) www.talk.com: "Created by [appellee] HotWired[] the uncensored chat here is in keeping with Wired's cyber-libertarian philosophy."

(3) www.wbs.net: "Chatters on this popular system can put a picture of themselves next to their typed text."

(4) www.talkcity.com: "300-plus chat rooms. It also provides a calendar with dates and times when special-interest chats are taking place."

(5) www.minds.com: "[E]mphasiz[es] conferenc[es]" in which "conversations take place as a series of postings organized into different topics. * * * Postings * * * stay up on the system for months at a time."

lees correctly note (ACLU Br. 32-33) that no evidence was presented to that effect at the PI hearing, it is telling that they do not dispute our assertion concerning the status of the Web today.[6] Having enacted the display provision at a time when the Web already provided wide-ranging opportunity to communicate indecent material to adults, Congress could reasonably rely on such market developments to afford even greater opportunity for such communication.

4. As we acknowledge in our opening brief (at 39), the cost of complying with the display provision is relevant to the constitutional inquiry. When a limitation on speech imposes significant costs, and a much less costly alternative would serve the government's interest equally well, government must choose the less burdensome alternative. But the costs of complying with the display provision are reasonable, and there is no alternative that would vindicate the government's interest equally well.

a. Appellees rely (ALA Br. 18) on a district court finding (J.S. App. 74a) that it would be "prohibitively expensive" for many speakers to operate adult verification systems. But as appellees acknowledge (ALA Br. 21), many commercial providers already require credit cards for the purchase of their material. The district court did not suggest that compliance with the display provision would be prohibitively expensive for them. Even as to noncommercial providers, the district court's finding addresses only the cost of creating and operating an adult verification system by oneself. That is not the only option. Appellees may pool their resources and create and main-

[6] The district court anticipated this development. See J.S. App. 32a ("Because of the rapidity of developments in this field, some of the technological facts we have found may become partially obsolete by the time of publication of these findings.").

tain a common adult verification system. Alternatively, appellees may hire another entity to provide such a service for them. The district court did not find that either one of those alternatives would be prohibitively expensive.[7]

In assessing the reasonableness of the costs of compliance, it is also significant that they do not come in the form of an undifferentiated tax. All the display provision requires is that speakers bear whatever costs are necessary to prevent their communications from harming children. Equally important, Congress expressly provided a forward-looking, open-ended defense that allows a person to use any method for screening that is effective. 47 U.S.C. 223(e)(5)(A). As the private market and technology evolve, the costs associated with protecting children are likely to become trivial.

b. Appellees contend (ALA Br. 34-37; ACLU Br. 36-37) that parental control software provides a more effective and less restrictive means of protecting children from Internet indecency. But as we explain in our opening brief (at 40-41), parental control software programs that attempt to screen out indecent sites are not effective because they can neither find all existing indecent sites nor keep pace with the explosion of new ones. At the same

[7] As we explain in our opening brief (at 36), third-party verification systems already exist that do not charge content providers for their services. While appellees do not wish to be associated with services that cater to pornographic sites, nothing would prevent appellees from using their market power to secure the services of an entity that would serve non-pornographic sites. Appellees' concern (ALA Br. 19) that persons will not purchase adult IDs in order to visit a single site is misguided. An adult ID, which can be purchased for a small fee, would entitle a person to visit multiple sites over an extended period. Appellees' desire to distribute their material cost-free (*ibid.*) and to remain completely anonymous (ACLU Br. 32) cannot take precedence over the interests in protecting children from the harmful effects of patently offensive communications and in ensuring that everyone enjoys the educational benefits of the Internet.

time, parental control software programs that screen out all sites except those that have been rated decent are effective in screening out indecent sites, but provide access to only a minuscule portion of the Internet. Reliance on such software would therefore defeat the government's ability to further the interests of parents and children in obtaining the educational benefits of the Internet. All existing software, including that provided by the major on-line services, suffers from one of those two deficiencies. Congress therefore reasonably concluded that, while parental control software could provide part of the answer to the problem of indecency on the Internet, it could not provide the full answer. Gov't Br. 40.

The district court did not conclude otherwise. Judges Sloviter and Buckwalter pointedly refrained from concluding that parental control software was a less restrictive alternative that would effectively vindicate the government's interests. See J.S. App. 77a-81a (Sloviter, J.); *id.* at 86a-87a (Buckwalter, J.).[8]

5. a. Appellees contend (ALA Br. 30-31) that Congress did not have evidence that patently offensive communications on the Internet pose a serious problem. But proponents and opponents of the CDA agreed that the problem was a serious one,[9] and the evidence introduced at trial confirms the pervasive nature of the problem. The

[8] Although Judge Dalzell identified blocking software as an option available to parents, he did not rely on such software to conclude that the statute was constitutionally infirm. J.S. App. 146a. Contrary to ACLU's assertion (Br. 36), Judge Dalzell's statement is not a "finding" of the district court.

[9] *E.g.*, 141 Cong. Rec. S8092 (daily ed. June 9, 1995) (remarks of Sen. Kerrey) ("I am prepared to acknowledge, and I think we should all acknowledge, there is a serious problem here."); *id.* at S8473 (daily ed. June 15, 1995) (remarks of Sen. Robb) (noting "the widespread availability of materials on the Internet that are entirely inappropriate for children"); Gov't Br. 6-7.

government's expert conducted a search of the Internet for pornography using the most obvious search terms and retrieved long lists of sites containing sexually explicit pictures. See generally J.A. 1-42 (declaration of Howard A. Schmidt). A notebook accompanying the expert's declaration contains the results of his search and leaves no doubt that Congress was addressing an extremely serious problem.

b. Appellees argue (ALA Br. 31-32; ACLU Br. 26) that Congress did not assert an interest in ensuring that parents would not be deterred from using the Internet when it enacted the CDA and that the government therefore may not assert such an interest now. The leading supporters of the CDA, however, clearly voiced that interest.[10] Appellees also assert (ALA Br. 31-32; ACLU Br. 30) that Congress did not have sufficient evidence to support its conclusion about the effect of indecency on Internet use. But Congress did not need to compile an evidentiary record to know that, if pornography remained freely

[10] *Cyberporn and Children: The Scope of the Problem, the State of the Technology, and the Need for Congressional Action: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong., 1st. Sess. 7 (1995) (opening statement of Sen. Grassley) ("Congress must give America's parents a new comfort level in public and commercial networks if these are to be transformed from the private preserve of a special class of computer hackers into a widely used communications medium. This necessary transformation will never happen if parents abandon the Internet and computer communications technology remains threatening."); 141 Cong. Rec. S8339 (daily ed. June 14, 1995); *id.* at S8339-S8340 (remarks of Sen. Exon) (expressing the desire to make the Internet "even bigger" and "even better, but not for raunchy pornography that would turn most people off"); *id.* at S8339 (remarks of Sen. Exon) ("it has been estimated that up to 75 percent * * * of present computer owners have refused to join the Internet system with their home computer, precisely because they know and they fear—and evidently they have seen or been advised as to [the prevalence of pornography on the Internet]").

available on the Internet, many parents would be "scared to death" about "its effect on their children," or that school principals who had encouraged parents to link their home computers to the Internet would reconsider their advice after learning more about "the seamy underbelly of the Internet." Wash. Post, note 2, *supra*, at B5. Congress could rely on its common sense and its understanding of the American people to reach those conclusions.

6. Appellees contend (ALA Br. 32-34) that the CDA will not be effective in accomplishing its goal because it will not deter persons outside the country from posting indecent communications. In issuing its preliminary injunction, however, the district court did not address that contention. It therefore did not address the extent to which the CDA applies to the foreign display of indecency on the Internet; it made no finding concerning what percentage of indecent speech originates outside the United States; it made no finding concerning the extent to which the CDA would deter the posting of indecent information outside the United States; and it reached no conclusion concerning the legal significance of any possible diminution of the CDA's effectiveness caused by indecency that originates from outside this country. This Court should not attempt to resolve questions like those in the first instance.[11]

In any event, appellees err in contending that the CDA will not serve the government's interests "in a direct and material way." *Turner Broadcasting Sys., Inc.* v. *FCC*, 512 U.S. 622, 664 (1994). The CDA will be fully effective in eliminating domestic displays of indecent material to children, which could eliminate as much as 70% of all such

[11] ACLU relies on a statement by Judge Dalzell that the CDA "will almost certainly fail to accomplish the Government's interest." ACLU Br. 34 (quoting J.S. App. 145a). But that statement was not joined by either of the other judges.

displays. See ALA Br. 32 n.42. That still leaves a significant problem. But other avenues, such as actions by foreign governments and parental control software, can work together with the CDA to control the foreign component of the problem. The existence of a law that is fully effective in this country assists each of those efforts. Such a law sets an example for other countries and puts the United States in a position to urge them to establish effective controls. At the same time, the effective screening of 70% of all patently offensive sites makes it easier for parental control software to keep pace with the sites that remain. Beyond that, the CDA sends an unambiguous message that minors' access to patently offensive material is not condoned in this country. Because the harm to children from viewing patently offensive material is exacerbated when there is an implicit societal approval of that activity, *Ginsberg*, 390 U.S. at 642 n.10, the sending of a clear message of disapproval is itself significant.

The extent to which our laws are applied to persons in other countries raises distinct policy concerns and practical enforcement difficulties. *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 794-799 (1993). This Court has never suggested that such considerations could affect the constitutionality of a law that is fully effective domestically.[12]

7. a. Appellees contend (ALA Br. 37-43; ACLU Br. 42-46) that all three provisions of the CDA are unconstitutionally vague. But the statutory text, when read in

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[12] The cases relied upon by appellees (ALA Br. 34) all involved laws that regulated certain domestic activities and exempted others that caused the same problem without any logical basis for treating the regulated and exempted activities differently. Such half-hearted efforts impeach the genuineness of the government's claim that it is advancing an interest of the highest order. *Church of Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 546-547 (1993). For the reasons set forth above, those cases are inapposite here.

light of its origins and legislative history, provides sufficient guidance concerning what should and should not be screened from children to avoid vagueness concerns.

First, the CDA applies only to communications about "sexual or excretory activities or organs." 47 U.S.C. 223(d)(1). No matter how shocking they may be, depictions that are not sexual or excretory in nature fall outside the scope of the CDA. Second, the CDA encompasses only those communications about sexual or excretory matters that are "patently offensive." *Ibid.* The communication therefore must be offensive in a way that is obvious or immediately apparent. *American Heritage Dictionary* 1326 (3d ed. 1992). Third, a communication is indecent only when it is patently offensive "in context." 47 U.S.C. 223(d)(1). For example, whereas an entire novel, taken as a whole, might not be "patently offensive," display of certain excerpts out of context might well be. Similarly, an "occasional expletive" will not render a communication indecent. *Denver Area*, 116 S. Ct. at 2390. Fourth, material with serious scientific, educational, news, or artistic value cannot be found to be "patently offensive," except in the most extreme circumstances, such as when such material is displayed "with a highly unusual lack of concern for viewer reaction." *Denver Area*, 116 S. Ct. at 2390. H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 189 (1996) ("[m]aterial with serious redeeming value" that "is quite obviously intended to edify and educate, not to offend" is not patently offensive). Thus, while a few of the examples discussed by appellees and their amici could be found to be patently offensive (*e.g.*, Appendix of Exhibits to Brief of Amici Curiae American Association of University Professors, et al., Exh. 3, Item 4; *id.* Exh. 10), the vast majority could not be. Finally, while nudity alone is not enough to make material patently offensive, centerfolds and similar materials that pander to prurient interest are covered by the CDA (Gov't Br. 6-7).

b. Apparently conceding that the formulation Congress chose would survive a vagueness challenge in other contexts, appellees contend that several factors render that formulation unconstitutionally vague here. ALA contends (Br. 38), for example, that the criminal nature of the offense is significant. But this Court has already approved analogous formulations in criminal statutes. See *Miller* v. *California*, 413 U.S. 15, 25 (1973); *Ginsberg*, 390 U.S. at 632-633.[13] ALA points out (Br. 40-41) that patent offensiveness was only one of the three elements in the statutes upheld in those cases. Each of those elements, however, was independent. Appellees cite no authority for their view that an independent element of an offense may be vague as long as other independent elements of the offense are not. Moreover, although lack of serious value is not an element of a CDA offense, the presence of serious value would almost always negate a finding of patent offensiveness. In actual operation, then, there will only be minor differences between the CDA's provisions and the statute approved in *Ginsberg*.

Appellees also find it significant that the CDA applies to millions of ordinary citizens. ALA Br. 38; ACLU Br. 42. Ordinary citizens, however, should have no difficulty figuring out that the pornographic pictures in the Schmidt notebook should be screened for age. More generally, there is "no basis for concluding that Internet content providers are any less capable than those subject to obscenity laws or other indecency restrictions to acquire a general familiarity with the relevant standards." *Shea*

[13] Because the CDA is designed to protect children, the meaning of patently offensive is that set forth in *Ginsberg*—"patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors." 390 U.S. at 633. It is not limited to the kind of "hard core" pornography that would be patently offensive for adults. *Jenkins* v. *Georgia*, 418 U.S. 153, 160 (1974).

v. *Reno*, 930 F. Supp. 916, 937 (S.D.N.Y. 1996), appeal pending, No. 96-595 (jurisdictional statement filed Oct. 15, 1996).

ACLU contends (Br. 45-46) that the CDA does not make clear whether patent offensiveness should be judged by a national or local standard. Even if a local standard was intended, ACLU contends, the CDA does not make clear which local standard applies. Because a jury (rather than a federal agency) must decide the question of patent offensiveness, however, the relevant standard is necessarily local: to require a local jury to apply a national standard "would be an exercise in futility." *Miller*, 413 U.S. at 30. The relevant community standard is the standard of the community in which the jury is empaneled.[14]

ALA contends (Br. 39) that, because the Internet is a global medium, Internet content providers must tailor their speech to fit the community standards of the least tolerant community in the nation. There is nothing constitutionally problematic, however, about requiring a nationwide provider of information to take account of the sensibilities of each of the communities in which it makes its information available. *Sable*, 492 U.S. at 125-126 ("If [the provider's] audience is comprised of different communities with different local standards, [the provider] ultimately bears the burden of complying with the prohibition on obscene messages."). In most cases, what is patently offensive in one community will be patently offensive in most. In borderline cases, where different communities

[14] The reference in the Conference Report to a "uniform national standard of content regulation" (H.R. Conf. Rep. No. 458, *supra*, at 191) does not suggest that local juries should attempt to divine a national standard of what is patently offensive. Instead, it means that juries throughout the country will all decide the same question—whether the material in question is patently offensive in light of local community standards.

may react in different ways, a person need only screen for age in order to avoid the possibility of criminal sanctions.[15]

* * * * *

For the foregoing reasons, as well as those stated in our opening brief, the district court's order granting a preliminary injunction should be reversed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

MARCH 1997

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[15] Appellees provide no answer to our argument (Br. 45-48) that preliminary injunctive relief must be limited to applications of the display provision that are determined to be unconstitutional and that all other applications must be left intact. Appellees' apparent view (ALA Br. 47 n.64) that a court has authority to ignore an unambiguous severability clause is mistaken. *INS* v. *Chadha*, 462 U.S. 919, 932 (1983). While the text of a severability clause is not controlling when the balance of the statute is incapable of functioning independently, *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987), that is not the situation here.

No. 96-511

Supreme Court, U.S.
FILED
JAN 21 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JANET RENO, Attorney General of the United States, et al.,

Appellants,

—v.—

AMERICAN CIVIL LIBERTIES UNION, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF MORALITY IN MEDIA, INC. AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS

Morality in Media, Inc. ("Amicus"), as Amicus Curiae, files this brief in support of the Appellants in this case, which is before this honorable Court on the merits under the provisions of Rule 37(3)(a). The written consents of the Appellants and Appellees have been requested and all parties have consented thereto in writing. Copies of these consents are being filed concurrently with this brief. Morality in Media has a special interest in this case because it was instrumental in suggesting language to authors of the legislation and also participated as Amicus in the court below, *ACLU v. Reno*, 929 F.Supp. 824 (E.D.Pa. 1996).

Morality in Media is a New York not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combating the distribution of obscene material in the United States and upholding decency standards in the media. Now national in scope, this organization has affiliates and chapters in various states, and its Board of Directors and Advisory Board are composed of prominent businessmen, clergy and civic leaders.

The Founder and President of Morality In Media (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the President's Commission on Obscenity and Pornography. He, along with Doctor Winfrey C. Link, produced the "Hill-Link Minority Report" of the Commission, which was cited by this honorable Court in *Kaplan v. California*, 413 U.S. 115, 120 n.4 (1973) and in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 at 58, notes 7 and 8 (1973). Morality in Media has also frequently participated as Amicus in cases before this Court, including *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *New York v. Ferber*, 458 U.S. 747 (1982); *Sable Communications v. FCC*, 492 U.S. 115 (1989); *and Denver Area Consortium v. FCC*, 116 S.Ct. 2374 (1996).

Morality in Media is filing this brief in support of

Appellants because it believes indecency on the Internet endangers children, threatens the privacy of the home and undermines the right of the nation to maintain a decent society. Based on the Jurisdictional Statement of the Appellants, Amicus believes its brief contains relevant matter that may not be brought to the attention of the Court by the parties, particularly, that in circumstances where indecency on the Internet constitutes "nuisance speech," it is unprotected by the First Amendment and that the "indecency" standard is an ***Indecent For All*** standard.

SUMMARY OF ARGUMENT

This Court has said there are narrowly limited classes of speech that are unprotected by the First Amendment. One such class is "nuisance speech." Amicus contends that "indecent" speech which, by means of interactive computer services, intrudes uninvitedly into the privacy of the home and is readily accessible to children is a form of "nuisance," which is unprotected by the First Amendment and which Congress can constitutionally regulate, as it has done in the CDA provisions.

The court below indicated children may not need protection from Internet content that is indecent but not obscene. This Court, however, has recognized that speech can be indecent and harmful to children, even though it is not prurient and may have serious value for adults. Furthermore, while Congress' concern in enacting the CDA provisions was protecting children, it utilized an **Indecent For All** standard that grew out of the adult obscenity test. Amicus contends that speech that is **Indecent For All** is a fortiori harmful to children.

In the court below, Appellees argued that the term "indecent" is vague and overbroad. In previous cases, however, this Court has rejected similar challenges. Amicus also contends that properly understood, the nuisance concept greatly reduces the amount of sexual or excretory speech encompassed by the CDA provisions.

The court below opined that the CDA provisions impose unacceptable "barriers to entry" on Internet providers of indecent content, preventing some providers from utilizing some "forms" of Internet communication. The First Amendment, however, does not guarantee a "freedom-from-responsibility" right to utilize the Internet; nor does it guarantee an unrestricted right to use every "form" of Internet communication. Amicus also contends that consenting adults have adequate alternatives to communicate indecently *by using their own computers*.

The court below opined that the CDA provisions would cause "wholesale disruption" on the Internet. Amicus would contend, however, that the Internet did not begin as a toy or windfall for indecency providers and would develop admirably even if all indecency were banned. The CDA provisions, however, do not ban indecency from the Internet.

The court below opined that the CDA provisions would be ineffective because of the international dimension of the Internet. As lawlessness on the international dimension of the Internet grows, however, international pressure will grow with it. Congress can constitutionally now address part of a serious problem without addressing all of it.

The court below also opined that parental use of screening technology is a better approach to the problem. Parental use of screening technology, however, cannot alone adequately protect children from indecency on the Internet.

ARGUMENT
I.
INDECENT COMMUNICATIONS WHICH, BY MEANS OF INTERACTIVE COMPUTER SERVICES, INTRUDE INTO THE PRIVACY OF THE HOME AND ARE READILY ACCESSIBLE TO CHILDREN ARE A FORM OF 'NUISANCE SPEECH' WHICH IS UNPROTECTED BY THE FIRST AMENDMENT

The concept of "nuisance speech," as a class of speech unprotected by the First Amendment, was first alluded to by this honorable Court in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), where the Court stated:

> There are certain, well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene...those which by their very utterance inflict injury or tend to incite an immediate breach of the peace...[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[1]

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[1] *Id.* at 571-572. Amicus says "alluded to" because the above quoted material, while not specifically mentioning nuisance speech, twice cites to *Free Speech in the United States*, by Zechariah Chafee, Jr. (1941), which does so at pp. 149-150:

> But the law also punishes a few classes of words like obscenity, profanity...because the very utterance of such words is considered to inflict a present injury upon listeners, readers...*[P]roperly limited they fall outside the protection of the free speech clauses...[P]rofanity, indecent talk and pictures*, which do not form an essential part of any exposition of ideas,have a very slight social value as a step toward truth, which is clearly outweighed by the social interests in order, morality, the training of the young and the peace of mind of those who hear or see...The man who

The nuisance rationale was also applied by three Justices dissenting in *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972). Justice Powell, with whom the Chief Justice and Justice Blackmun joined, wrote at 408 U.S. 905-906:

> But the exception to the First Amendment protection in *Chaplinsky* is not limited to words whose mere utterance entails a high probability of an outbreak of physical violence. It also extends to the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience... [A] verbal assault on an unwilling audience may be so grossly offensive and emotionally disturbing as to be the...subject of criminal proscription, whether under a statute denominating it disorderly conduct, or, more accurately, a public nuisance...The Model Penal Code...also recognizes a distinction between utterances which may threaten physical violence and those which may amount to a public nuisance, recognizing that neither category falls within...First Amendment [protection]. [Emphasis supplied]

In *Breard v. Alexandria*, 341 U.S. 622 (1951) and *Kovacs v. Cooper*, 366 U.S. 77 (1949), this Court upheld nuisance ordinances aimed at means of communication that intrude uninvitedly into the privacy of the home. As the Court in *Kovacs* stated at 366 U.S. at 88-89:

> The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens for comfort and

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> swears in a street car is as much of a *nuisance* as the man who smokes there. [Emphasis supplied]

Cf., 50 *Am. Jur. 2d* Lewdness, Indecency pp. 484-485 (use of indecent language under certain circumstances "considered a nuisance.") and *Am. Jur. Proof of Facts*, Vol. 8, p. 530 (1960)(nuisance may be established by showing that the "laws of decency" are violated).

convenience. That more people may be more easily and cheaply reached by sound trucks...is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open. [Emphasis supplied]

In *Hess v. Indiana*, 414 U.S. 105 (1973), this Court again identified speech that amounts to a public nuisance as being outside the protection of the First Amendment:

> It hardly needs repeating that '[t]he...guarantees of freedom of speech forbid the States to punish the use of words or language not within `narrowly limited classes of speech.'...Hess' words could [not] be punished as obscene...By the same token, any suggestion that Hess' speech amounted to 'fighting words'...could not withstand scrutiny... In addition, there is no evidence to indicate that Hess' speech amounted to a public nuisance in that privacy interests were being invaded.[2] [Emphasis added]

In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) ("*Pacifica*"), this Court affirmed an FCC ruling that the monologue, "Filthy Words," as broadcast was indecent and prohibited by 18 U.S.C. 1464. In so doing, the Court observed that the ruling "rested entirely on a nuisance rationale under which context is all-important." Id. at 750.

In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), this Court held that a student could be penalized for making an indecent speech before a school assembly, attended by both students and faculty. Justice Stevens (dissenting on due process grounds) noted:

> [A] `nuisance may be merely a right thing in the wrong place--like a pig in the parlor instead of the

[2] *Id.* at 107-108. *See also, Redrup v. New York*, 386 U.S. 767, 769 (1967), recognizing a need for government protection against an "assault upon individual privacy."

> barnyard...Vulgar language, like vulgar animals, may be acceptable in some contexts, and intolerable in others...It seems...obvious that [the] speech would be inappropriate in certain...settings."[3]

Amicus contends that "indecent" speech which, by means of interactive computer services, intrudes uninvitedly into the privacy of the home and is readily accessible to children is also "nuisance speech" which is unprotected by the First Amendment and which Congress can regulate, as it has chosen to do by amending 47 U.S.C. 223 to restrict children's access to indecency readily available on the Internet (hereinafter, "CDA provisions").[4]

II.
CHILDREN NEED PROTECTION FROM INTERNET CONTENT THAT IS 'INDECENT' BUT NOT OBSCENE

In the court below (929 F.Supp. at 852-853), Judge Sloviter questioned whether Government has a sufficient interest in protecting children from Internet content that is indecent but not "pornographic." One type of Internet content that concerned Judge Sloviter was information about AIDS (929 F.Supp. at 853).

[3] *Id.* at 696. Cf., *Close v. Lederle*, 424 F.2d 988 (1st Cir. 1970), *cert den.*, 400 U.S. 903 (quoting Wright, Constitution on the Campus, 22 Vand.L.Rev. 1027, at 1058 (1969)):

> There are words that are not regarded as obscene, in the constitutional sense, that nevertheless need not be permitted in every context. Words that might properly be employed in a term paper or in a novel submitted in a creative writing course take on a very different coloration if...bellowed over a loudspeaker at a campus rally or appear prominently on a sign posted on a campus tree.

[4] Amicus does not say indecency is unprotected in every context *Cf., Pacifica*, 438 U.S. at 746 ("We may assume, arguendo, this monologue would be protected in other contexts").

Labelling information about AIDS as "educational," however, does not mean it can't harm children. So-called "AIDS education" ranges from "bio-course" descriptions of sexually transmitted diseases; to "clinical" descriptions of "safer sex;" to explicit descriptions of sexual activities replete with vulgar, obscene language;[5] to hardcore pornography.[6]

Judge Sloviter was also concerned about prison rights groups which use graphic language to describe sexual abuse of prisoners (929 F.Supp. at 853). A report of students who went to court to learn about the legal system, but were inadvertently exposed to a "graphic videotaped" confession of an alleged rapist, indicates children can also be harmed by such content:

> Many of the children, all dressed in neatly pressed outfits, sat wide-eyed. Others snickered, and some appeared uncomfortable, looking down at the floor...The father of one...boy said, "The boys at 13 are...impressionable and certainly interested in hearing about sex. I'm not sure this is the right form for them to hear it."[7]

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[5] In 1994, explicit "safe sex" literature, prepared for adults by the Gay Men's Health Crisis, was distributed at a high school conference, cosponsored by the New York City Board of Education. In the uproar that followed, Schools' chancellor Ramon Cortines said the literature "dealt with sexual practices, contained language that was totally inappropriate and possessed no educational value.", **"This Isn't Kid Stuff,"** *N.Y. Newsday* 3/23/94 Presumably, an "occasional expletive" would not a sanction. *Pacifica*, 438 U.S. at 750.

[6] In *Rees v. Texas*, 909 S.W.2d 264 (Tex. Ct. App. 1995), *cert. den.*, 65 LW 3261 (U.S. 10/7/96), two men were convicted of promoting obscenity for showing a "sexually explicit" film on a public access cable TV program. On appeal they argued unsuccessfully that the purpose of the after-midnight program, "Infosex," was to promote "safe sex techniques," and that the film, "Midnight Snack," had "educational value." As described in the indictment, the film depicted "a man with the penis of another man in his mouth, a man placing his finger in the anus of another, a man with his tongue licking the anus of another and two men masturbating each other."

[7] **"School kids get a lurid lesson,"** *N.Y. Daily News*, 9/27/96.

In *Pacifica*, this Court recognized that children can be harmed by sexual or excretory speech that is "'vulgar,' 'offensive,' and 'shocking,'" even though it isn't prurient and may have serious value for adults. Id., 438 U.S. at 747. *In Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), this Court also recognized that a speech that was "offensively lewd and indecent" (Id. at 683), but not obscene, could be "seriously damaging" to a "less mature audience" (Id. at 558).

In *Denver Area Consortium v. FCC*, 64 LW 4706 (1996)(hereinafter "*Denver Area Consortium*"), Justice Breyer, after noting that this Court has often found "compelling" the government interest in protecting children from "patently offensive sex-related material," indicated that depending on context, such material can be "patently offensive" even though it has "nonprurient purposes" and has serious value. Id. at 4712-4713 (plurality opinion).

Furthermore, while Congress' concern in enacting the CDA provisions was protecting children, it utilized a standard, "indecent" or "patent offensiveness," that grew out of the *obscenity test* and is an **Indecent For All** -- not an indecent for children[8] -- standard. Amicus contends that sexual or excretory speech that is **Indecent For All** is a fortiori harmful to children.[9] The meaning and origin of the "patent offensiveness" and "indecency" concepts are described in the *Obscenity Law*

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[8] *Cf., Ginsberg v. New York*, 390 U.S. 629 (1968).

[9] The requirement that sexual or excretory speech be depicted or described in a "patently offensive" manner distinguishes the CDA provisions from the ordinance at issue in *Erznoznick v. City of Jacksonville*, 95 S.Ct. 2268 (1975), which forbade the display of all films containing "any uncovered buttocks or breasts, *irrespective of context or pervasiveness*." *Id.*, at 2274. [Emphasis supplied]

Reporter:[10]

> In *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962), Justices Harlan and Stewart...added a new element to the...test for obscenity by requiring that the material...also be "patently offensive"...They stated, "These magazines cannot be deemed so offensive on their face as to affront community standards of decency--a quality that we shall hereafter refer to as 'patent offensiveness' or 'indecency.'" The two justices also noted that the American Law Institute's draft of a Model Penal Code took the position that for a thing to be obscene, it must go substantially beyond the limits of candor in description or representation of such matters. [Emphasis supplied]

In *Pacifica*, this Court noted that in *Manual Enterprises*, Justice Harlan used the term "indecency" as a "shorthand term" for "patent offensiveness," a usage the *Pacifica* Court found "strikingly similar" to the FCC's definition of indecency at issue in that case. 438 U.S. at 740, n.15. The *Pacifica* Court also said the "normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality" (438 U.S. 726, at 740) and recognized a valid interest in shielding not just children but also adults in the privacy of their homes from the searing string of obscenities at issue in that case.[11]

In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, at 682 (1986), this Court noted members of Congress were prohibited from using "indecent language against the proceedings of the House." The *Bethel* Court also stated:

> "[S]chools must teach by example the shared values of a civilized social order....The pervasive sexual innuendo in

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10 Chapter on "Patent Offensiveness," Vol. 1, pp. 7002-7003 (National Obscenity Law Center 1986).

11 *Id.*, 438 U.S. 748-749, Justice Powell, concurring, at 759-760. See also, *Denver Area Consortium*, 64 LW at 4710-4711.

> [the student's] speech was plainly offensive to...teachers and students--indeed to any mature person." 478 U.S. at 683 [Emphasis added]

In *Barnes v. Glen Theatre*, 501 U.S. 560 (1991), this Court upheld an Indiana statute prohibiting "Public Indecency." In so doing, Chief Justice Rehnquist noted:

> "Public indecency statutes of this sort...reflect the moral disapproval of people appearing in the nude among strangers in pubic places....Thus the public indecency statute furthers a substantial government interest in protecting order and morality."[12]

In arguing that the indecency standard is an **Indecent For All standard**, Amicus would also argue that not just the well-being of children but also the privacy of the home[13] needs protection from Internet indecency. Both adults and children can be surprised by indecency on the Internet,[14] and as the Internet

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12 *Id.* at 568-569. While the plaintiffs in *Barnes* were "sexually oriented businesses," the statute at issue was not aimed at the "erotic message" of dancers. 501 U.S. at 568-569.

13 In *Frisby v. Schultz*, 487 U.S. 474, 484-485 (1988, this Court described the "interest" in protecting the well-being, tranquility, and privacy of the home as being "certainly of the highest order in a free and civilized society." The Court then stated at 484-485:

> One important aspect of residential privacy is protection of the unwilling listener...Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that government may protect this freedom. See, e.g., *FCC v. Pacifica*, 438 U.S. 726, 748-749 (1978)...; *id.*, at 759-760 (Powell, J. concurring in part and concurring in judgement).

See also, *People v. Starview Drive-In Theatre*, 427 N.E.2d 201 (Ill. App. Ct. 1981), *appeal dism'd sub nom., Starview Drive-In Theatre v. Cook Co.*, 457 U.S. 1113 (1982).

14 Cf., op ed article "The Internet's Private Side," N.Y. Times, 3/2/96, wherein author David S. Bennahum, publisher of MEME, an

becomes more like broadcasting,[15] both will increasingly be unwillingly "assaulted"[16] by indecent content. Amicus would also contend that the CDA provisions, which regulate sexual or excretory speech portrayed in a manner so offensive as to make it **Indecent For All** do not reduce the adult population to viewing only what is fit for children.

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on-line newsletter, states:

> During a jaunt through the World Wide Web, I came across a seemingly innocuous invitation, 'This is a HOT link.' I clicked on the glowing words, which connected me with another computer that generated a picture of a nude woman with the tag line 'Slut for Rent'...This phone-sex service..., just an accidental mouse click away, shows how easily browsers can stumble across pornography on computer networks.

15 See, e.g., **"Channel surfing to the Web,"** *USA TODAY*, 1/9/97 (WebTV-like products that turn TVs into Internet surfboards and make web more like TV); **"PC Meets TV: The Plot Thickens,"** *Business Week*, 12/23/96 (pages similar in look to Web pages "broadcast" to PC); **"How Net Is Becoming More Like TV To Draw Advertisers,"** *Wall Street Journal*, 12/13/96 (Web "surfers" who sift through data giving way to Web "viewers" who have information "pushed" directly to PCs); **"Way paved for PCTVs,"** *Broadcasting & Cable*, 12/2/96 (TV "channel surfers" trading in remote controls for a mouse and keyboard); **"TV Screen Opens Onto Internet,"** *N.Y. Times*, 10/22/96 (computer network transformed into something "like a TV network); **"Web music networks take programming beyond radio dial,"** *USA TODAY*, 1/6/96 (Net "radio stations" with "continuous real-time audio").

16 In *Pacifica*, this Court compared patently offensive, indecent broadcast programming to a physical assault: "To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. *Id.* at 438 U.S. 748-749.

III.
THE 'INDECENCY' STANDARD IS NEITHER VAGUE NOR OVERBROAD

In the district court below, Appellees argued that the term "indecent" is vague and overbroad. In *Pacifica*, however, this Court, rejected a very similar challenge:

> [Pacifica] argues that the Commission's construction of the statutory language broadly encompasses so much constitutionally protected speech that reversal is required...At most, however, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of these references may be protected, they surely lie at the periphery of First Amendment concern...The danger dismissed so summarily in Red Lion...was that broadcasters would respond to the vagueness of the regulations by refusing to present programs dealing with important social and political controversies. Invalidating any rule on the basis of its hypothetical application to situations not before the Court is "strong medicine" to be applied "sparingly and only as a last resort...We decline to administer that medicine to preserve the vigor of patently offensive sexual and excretory speech. 438 U.S. at 742-743.

In Denver Area Consortium, this Court specifically rejected a vagueness challenge to a definition of indecency similar to the one at issue here, noting the similarity of that definition to the "patently offensive sexual conduct" prong of the obscenity test.[17] A definition of indecency similar to the one at issue here was also upheld in *Dial Information Services Corp. of New York v. Thornburgh*, 938 F.2d 1535 (2nd Cir. 1991), *cert. den.*, 60 LW

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17 *Id.*, at 4712-4713. In *Miller v. California*, 413 U.S. 15, at 27-28 (1973), this Court pointed to the "patently offensive" prong of its obscenity test as providing fair notice to distributors of sex materials.

3520 (U.S. 1992). There is also an extensive history of court and FCC rulings to guide content providers in determining what is "indecent."[18]

Amicus would also argue that, properly understood, the indecency definition and nuisance concept greatly reduce the amount of speech encompassed by the CDA provisions. The test is not whether content is "offensive," but rather whether it is "*patently offensive.*" The test is not whether content is "offensive" to a some citizens, but rather whether it is patently offensive under "*community standards.*"[19] The test is not whether the community disagrees with the speaker's view,[20] but rather whether sexual or excretory speech is depicted or described in a manner so offensive as to be unacceptable under community standards.

In determining whether such speech constitutes a nuisance, "context is all-important." *Pacifica*, 438 U.S. at 750. Whether in the physical realm or in cyberspace, "place" is an important variable in determining whether something is a nuisance, since a "nuisance may be merely a right thing in the wrong place,--like a pig in the parlor instead of the barnyard."

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18 *See, e.g., Pacifica*, 438 U.S. at 741, n.16; and "Five Indecency Complaints Dismissed by the FCC," *N.Y. Times*, 4/9/88 [including one against a TV station that broadcast a "sex education" program for teens (with "frank discussions of sexual topics, the use of sex-organ models and simulated demonstrations of various birth control devices") and another against a radio station for airing a reading from "Ulysses" (with sexual and excretory references "dispersed" throughout the three-hour reading)],.

19 The relevant community is that embraced within the territory comprising the jurisdiction of the Federal District Court, and while some districts may be more "conservative" than others, none is as hyper-sensitive as portrayed by Appellees.

20 *Pacifica*, 438 U.S. at 745-746. See also *Denver Area Consortium*, 64 LW at 4718 (Stevens, J., concurring) ("viewpoint neutral").

Pacifica, 438 U.S. at 750. Speech that may be acceptable in a part of "cyberspace" devoted to health or human rights, may be patently offensive in an area devoted to "indoors activities for families."

Just as the content of a broadcast program will affect the composition of the audience (see *Pacifica*, 438 U.S. at 750), so too will the content of a cyberspace "site." For example, a site devoted to "Hot chicks to fulfill your lusts" will likely attract far more minors than a site devoted to poetry or drama.[21] Other aspects of "context" to be considered include the time of day;[22] whether the communication "appeals to the prurient interest"[23] or is pandered for its "prurient appeal;"[24] whether viewers are confronted without warning;[25] and whether the content has "serious value."[26] As noted in *Pacifica*:

> Some uses of even the most offensive words are unquestionably protected...Indeed, we may assume, *arguendo*, that this monologue would be protected in other

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21 Audience composition affects "patent offensiveness" because minors should be considered only to the extent they are likely to be recipients. *Cf., Pinkus v. United States*, 436 U.S. 293, at 298 (1978).

22 *Pacifica*, 438 U.S. 726, at 750. While not all indecent communications in cyberspace can be time channelled, many, particularly live communications, can be time channelled.

23 While content can be "indecent" without being prurient (Pacifica, 438 U.S. at 741), prurient content is much more likely to be "patently offensive." *Cf., Manual Enterprises v. Day*, 370 U.S. at 486.

24 *Cf., Ginzburg v. United States*, 383 U.S. 463 (1966).

25 *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, at 127-128 (1989).

26 Serious value is a key variable in determining whether content is indecent. *Cf., Pacifica*, 438 U.S. at 732, n.6; *Action for Children's TV v. FCC*, 852 F.2d 1332, at 1339-1340 (D.C.Cir. 1988).

> contexts. Nonetheless, the. . .protection accorded. . .a communication containing patently offensive sexual or excretory language need not be the same in every context. It is a characteristic of speech such as this that both its capacity to offend and its 'social value'...vary with the circumstances. ...Because content of that character is not entitled to absolute constitutional protection under all circumstances, we must consider its context in order to determine whether the Commission's action was constitutional. 438 U.S. at 746-747.

In response to the concern that the CDA provisions reach "speech subject to the full protection of the First Amendment" (929 F.Supp. at 855), *Pacifica* (opinion of Stevens, J.) has also said that indecent speech is at the "periphery of First Amendment concern"[27] and that since indecency restrictions have their "primary effect on the form, rather than the content, of serious communication," there are "few, if any, thoughts that cannot be expressed by the use of less offensive language." *Pacifica*, 438 U.S. at 743, n.18.

IV.
THE CDA DOES NOT ERECT UNCONSTITUTIONAL 'ENTRY BARRIERS' TO SENDING OR RECEIVING INFORMATION VIA INTERACTIVE COMPUTER SERVICES

In the court below (929 F.Supp. at 856-857, 877-879), Judges Sloviter and Dalzell opined that the CDA provisions are unconstitutional because they would impose unacceptable

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27 *Pacifica*, 438 U.S. at 743. *See also, Bethel School District*, 478 U.S. 675, 688 (1986)(quoting from *Pacifica* and *Chaplinksy v. New Hampshire*, 315 U.S. 568, 572); *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) ("not all speech is of equal First Amendment importance"); *Barnes v. Glen Theatre*, 501 U.S. 560, 566 (1991); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1991) (Stevens, J., concurring).

"barriers to entry" on Internet content providers of indecent content, preventing some providers from fully utilizing every "form" of Internet communication. Amicus, however, contends that the First Amendment does not guarantee a "freedom-from-responsibility"[28] right to utilize the Internet; nor does it guarantee an unrestricted right to use every "form" of Internet communication.

Licensees of the most influential means of communication in this century (broadcasting), have been prohibited from airing indecent material since 1927, and the impossibility of shielding youth from broadcast indecency without "restricting the expression at its source" (Pacifica, 438 U.S. at 749) was the justification for upholding the law, not a reason to invalidate it. Nor do TV companies have an unrestricted right to transmit indecency on every "form" of TV communication.[29] Companies that own both TV broadcast stations and cable TV systems must confine indecent programming to their cable systems. If Congress enacts a law prohibiting indecent programming on basic cable, these companies will have to confine indecent programming to premium or pay-per-view cable channels.

Indecent programming on cable TV leased access channels can also be prohibited (Denver Area Consortium, 64 LW 4706), and while this Court invalidated the statutory provision allowing cable operators to ban indecent programming on public access channels, the plurality opinion indicated "public/nonprofit programming control systems...would normally avoid, minimize, or eliminate any child-related problems concerning patently offensive programming." Id. at 4715-4716.

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28 *Cf., Near v. Minnesota*, 283 U.S. 697, at 713-714 (1931) (distinguishing between "previous restraints" upon publication and "subsequent punishment" for what is contrary to the public welfare).

29 The *Pacifica* Court treated "differences" between forms of communication as a "variable" in determining whether language constituted a "nuisance." 438 U.S at 750.

Indecent dial-it services must also restrict minors' access to their services. The Federal "dial-a-porn" law applies to commercial providers because commercial dial-it services are the overriding indecency problem in the telephone medium. With the Internet, however, a great deal of the indecent content is free,[30] and free content is almost always offered without restriction.

Adults can also negotiate with others to bring forms of Internet communication into compliance with the CDA provisions or set up their own forms which do comply. While *City of Renton v. Playtime Theatres*, involved availability of property "sites," the reasoning should also apply to cyberspace "sites:"

> That respondents must fend for themselves...on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation...[W]e have never suggested that the First Amendment compels Government to ensure that adult theaters, or...other...speech-related businesses..., will be able to obtain sites at bargain prices. 106 S.Ct. 925, at 932 (1986).

Persons with computers linked to the Internet also have access to alternative sources of communications.[31] In fact, consenting adults have many inexpensive ways to either obtain or send indecent communications *by using their own computers*.[32]

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30 **See, e.g., "Electronic Erotica: Too Much Traffic,"** *Wall Street Journal*, 2/8/95 (users like fact that "on-line pornography is free").

31 *Cf., Pacifica*, 438 U.S at 750 n.28; *Denver Area Consortium*, 64 LW at 4711.

32 For example, one-on-one e-mail, computer "bulletin boards" or the telephone. See e.g., **"Soon, phones will be called upon to do more,"** USA TODAY, 1/9/97 (visions of the telephone's future include, "as a mini-PC"); **"Intel and Microsoft to Sell Video Phones For Use on Internet,"** Wall Street Journal, 12/9/96; **"Expanding the Boundaries of E-Mail,"** *N.Y. Times*, 9/23/96; **"Calling Long Distance, on a PC and the Internet,"** *N.Y. Times*, 5/19/96.

The "burden" of complying with the CDA provisions can also be reduced for many Internet content providers by segregating "indecent" content and requiring proof of age only for that content--just as mainstream bookstores, videostores, convenience stores and libraries already do. That many or all of the Appellees may not want or desire to deny children access to indecent content is not the same thing as being unable to do so. Amicus would also point out that just as current adult obscenity and harmful-to-minors laws do not impose "strict liability" on book, video and convenience stores, so the CDA indecency provisions do not impose strict liability on Internet content providers.

In a related concern, Judge Sloviter also opined (929 F.Supp. at 854) that Internet content providers would be unable to avail themselves of the statutory defenses because even if they could attempt age verification, there is little assurance they could successfully filter out minors. While Internet content providers may now be unable to take steps to ensure that <u>everyone</u> who provides proof of age is in fact not a minor, they can take reasonable, effective and appropriate steps to verify age[33] <u>which will help</u> deter accidental and "spur of the moment" decisions and <u>will also deter</u> minors unable or unwilling to engage in lying, stealing or forging in order to provide age verification.

As described in the monograph, "The Popular Myth of Victimless Crimes,"[34] law also has a "teaching" and "standard-setting" function. By reinforcing society's moral values, the law deters behavior that is harmful to society or individuals, irrespective of whether it can be effectively enforced in a given

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33 State laws restricting minors access to alcohol, cigarettes and pornography do not require retailers to ensure to a certainty that those who purchase these products over-the-counter are not minors, but such laws do require retailers to check identification.

34 Dallin H. Oaks, Brigham Young Univ. Press, Provo, Utah.

situation. Ask retailers whether theft is a big problem, and the answer will be "Yes." But ask consumers whether theft laws have ever discouraged them from stealing, and many if not most will also say "Yes."

V.
CDA PROVISIONS WILL NOT CAUSE WHOLESALE DISRUPTION ON THE INTERNET

In the court below (929 F.Supp. at 877-879), Judge Dalzell opined that the CDA provisions will cause "wholesale disruption" on the Internet and have a major impact on Internet technology and adult participation. It is by no means clear, however, why a restriction on indecent communications will have such a drastic effect. The Internet began as a National Defense project and developed rapidly without serving as a primary conduit for indecency.[35] Just as national self-preservation was and is a powerful motivation to encourage development of the Internet, so now research and education,[36] politics, religion and financial gain[37] also serve as powerful motivations.[38]

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35 Although individuals misused the system, it was financed by the government and established and used primarily for governmental, educational and research purposes.

36 A group of universities recently agreed to create a second Internet. **"34 Universities Agree to Set Up Another Internet,"** *N.Y. Times*, 10/7/96.

37 Most businesses are trying to block employee access to indecent content, not increase it. See, e.g., **"New Issue at Work: On-Line Sex Sites,"** *N.Y. Times*, 6/27/96; **"Parental Control Software Effectively Monitors Employees Internet Activity--Improves Productivity,"** PR Newswire, 3/26/96.

38 See, e.g., **"Awards acknowledge Internet Innovation,"** *USA TODAY*, 12/4/96 (Ten projects received National Information Infrastructure Awards for demonstrating innovative uses of the Internet to benefit industry and society. The projects included the NSF Fastlane Project; Wall Street Journal Interactive Edition; Faces of Adoption; Starbright World, helping seriously ill children overcome

Furthermore, the CDA provisions only affect speech which, in context, depicts or describes, in terms patently offensive, sexual or excretory activities or organs. Only a tiny fraction of communications necessary for government, research, education, politics, business and other matters of public concern, as well as for matters of private concern, may be indecent.

As stated above, the CDA provisions do not impose strict liability on Internet content providers. As also stated above, there are many ways for consenting adults to use a personal computer and the Internet to transmit indecent content without violating the CDA provisions.

VI.
INTERNATIONAL DIMENSION OF THE INTERNET DOES NOT PREVENT CONGRESS FROM ADDRESSING THE DOMESTIC DIMENSION

In the court below (929 F.Supp. at 882-883), Judge Dalzell stated that the CDA provisions "will almost certainly fail to accomplish the Government's interest in shielding children from pornography on the Internet" because much Internet content is available internationally.[39] That some content providers may circumvent the CDA provisions, however, does not mean the law won't deter U.S. citizens and foreign entities with U.S. affiliates.[40]

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isolation; Jason VII Project, bringing actual research to 2 million students; Applied Informatics, coordinating health care service; and Charlotte's Web, designed to help people use the Internet to improve their lives and encourage civic involvement.).

39 In particular, Judge Dalzell said that the "residents of Amsterdam have little incentive to comply with the CDA." But see, **"Netherlands-Internet Porn,"** APn 12/30/95 (Amsterdam-based Internet service Xs4all shut off a subscriber's on-line access after the user scanned hundreds of pornographic pictures of children onto the computer network.).

40 See, e.g., **"Foreign entities whose WEB sites violate U.S. laws relating to...obscenity may subject American affiliates to prosecution,"**

Furthermore, as the Internet grows and the plague of illegal activity now present on the Internet continues to grow along with it, international pressure against pornography can be expected to increase.[41] For example, anonymous servers or "remailers" can make it difficult to track down criminals, but one of the world's largest international remailers was recently closed, after accusations it was used for child pornography.[42]

Law enforcement agencies are having difficulty enforcing many laws on the Internet, including those pertaining to child porn, copyright, fraud, harassment, libel, gambling, child abuse, terrorism and theft. That "Internet outlaws" may now be winning is not a reason to declare these laws unconstitutional, just as there is no reason to invalidate the Federal dial-a-porn law because international connections make its enforcement more difficult or the Federal satellite-porn law because transmissions from foreign-owned satellites make its enforcement more difficult.

This Court has recognized that Legislative bodies can attack one problem at a time and can experiment with solutions to admittedly serious problems.

National Law Journal, 11/18/96.

41 *See, e.g.*, "British Govt Moves To Stamp Out Internet Porn," COMTEX Newswire, 9/27/96; "Euro-Comm to tackle Internet porn," Reuters Financial Report, 9/24/96; "Singapore blocks 'a few dozen' Internet porn sites," Reuters NA, 9/20/96; "Germany Plans to Punish Internet Indecency," Reuters NA, 8/22/96; "ASEAN sets stage for possible Internet regulations," Reuters NA, 3/7/96.

42 See, "Stamp Electronic Mail With Name?," *N.Y. Newsday*, 1/4/94 and "Finn to close Net Remailer after Child Porn Claim," *Reuters World Report, 8/30/96.*

VII.
PARENTAL USE OF SCREENING TECHNOLOGIES CANNOT ALONE PROTECT CHILDREN FROM INDECENT CONTENT ON THE INTERNET

To head off regulation, the telecommunications industry embarked on a huge public relations campaign to promote the use of screening technology to shield children from pornography on the Internet.[43] It should not be assumed, however, that all parents are deeply involved with their children's lives,[44] and are keeping abreast of the matter,[45] and are overcoming their "technophobia"[46] and are solving the problem of the "two-computer family."[47]

Recent disturbing statistics on teen smoking and drug use, HIV rates among gays and deaths involving drunk drivers should caution us about putting too much reliance on PR campaigns. We should also learn something from parental failure to use available methods of keeping other sources of pornography out of the home.

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43 *See, e.g.*, "Plan to Block Censorship on Internet--Preemptory Effort At Self-Policing," *N.Y. Times*, 3/13/96.

44 "Comprehensive Study Finds Parents and Peers are Most Crucial Influences on Students," *N.Y. Times*, 8/7/96 (Author of a study to determine the most crucial influences on students says parents have become "seriously disengaged" from their children's lives.).

45 "Study: Public Tuning Out T.V. News," *N.Y. Newsday*, 5/13/96 (A major study by the Pew Research Center reported a widespread decline in the number of adults who watch nightly TV news programs.); "Few Are Interested in Most News Stories, Survey Finds," *L.A. Times*, 12/30/95 (Report by the Times Mirror Center for the People and Press indicated only one in four pays very close attention to most news.)

46 "Technophobia," *N.Y. Newsday*, 5/21/94.

47 "The Rise of the Two-Computer Family," *N.Y. Times*, 6/29/95.

One would think that every parent would have contacted the Postal Service, phone companies and cable operators to have pornography blocked -- before there is a problem. But most don't act until after a problem is discovered.

Even if parents utilize screening technology, however, they cannot rest assured their children will be protected. No technology can guarantee that all indecent material on the Internet will be blocked. Programs which block access to specific sites must keep up with the exploding number of sites. Indecent material also "pops up" in areas where it isn't suppose to--including kids' sites.[48] Programs that screen for words and phrases can be fooled; programs which screen images are imperfect. Screening technology that depends on providers to rate themselves will suffer from noncompliance, poor judgment and pranks.

Furthermore, if major companies and the U.S. Government protect their computers against teen "hackers," screening technology will not keep tech-savvy teens away from indecency available without restriction.[49] As younger and

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48 **"America Online to Tighten Security to Protect Kids,"** *Dow Jones Wire Service*, 3/20/96 (America Online member disseminated obscene images in a kid's area).

49 In *Sable Communications California v. FCC*, 492 U.S. 115, 130 (1989), the Supreme Court struck down a total ban on indecent commercial telephone messages, reasoning in part that, "For all we know...the FCC's technological approach to restricting dial-a-porn messages to adults who seek them would be extremely effective, and only a few of the most enterprising and disobedient young people will manage to secure access to such messages." There is a difference, however, between gaining access to a dial-a-porn service by engaging in a morally culpable act (e.g., stealing a credit card or forging an ID), and gaining access to an Internet site by being smarter than the technocrats. Furthermore, stolen or forged ID's can only be circulated so far, but "smarts" can be transferred to any kid with access to computers at school, home or elsewhere. Indecent material on the Internet is also free of charge, which means that there are no financial

younger children become "computer literate," even they can be expected to learn how to outsmart screening technology.

But even if all parents used screening technology And all such technology was 100% effective And 100% tamper-proof, there would still be a problem. Technology on home computers does not protect children or teens when they access computers elsewhere, for example, at a friend or relative's home, public school,[50] library, place of employment, retail business,[51] "Internet Cafe," or hotel or motel. Handheld computers that allow e-mail and Internet browsing will also soon be readily available.[52]

CONCLUSION

Parental use of screening technologies cannot ensure that children will not be exposed to indecency on the Internet. The CDA provisions are needed, and the issue now before this honorable Court is whether the right to live and raise children in a decent society outweighs the claimed right to disseminate, without restriction or "burden," patently offensive sexual and excretory speech on the Internet.

While this Court has held that "indecent" communications are protected by the First Amendment in some contexts, it has also held that where unwilling adults are assaulted by indecent programming in the privacy of the home and where children have

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barriers and no home phone bills to alert parents to the problem.

50 Not all schools use screening technology. *See, e.g.*, **"Students Told to Abide by Rules of Superhighway,"** *L.A. Times*, 8/26/96.

51 *See, e.g.*, **"Kinko's Adds Internet Services to Its Copying Business,"** *N.Y. Times*, 3/18/96 (Kinko's, with roughly 850 outlets nationwide, has added Internet services to its copying business.).

52 **"Handheld computer market about to surge,"** *USA TODAY*, 10/28/96.

ready access to it, indecent material can be restricted, and restricted at its source.

The CDA provisions do not ban consenting adults from using the Internet to communicate indecently;[53] nor do they drive "certain ideas or viewpoints from the marketplace."[54] They do protect "rights and interests, 'other than those of the [indecency] advocates'"[55]--which include the protection of children, the privacy of the home and the "right of the Nation...to maintain a decent society."[56]

Upholding the provisions will also help ensure that the Internet will not become a toxic, technological sewer or, perhaps more accurately, a public nuisance and will help discourage that "permissiveness" which can only "tend further to erode public confidence in the law--that subtle but indispensable ingredient of ordered liberty."[57]

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[53] The district court below relied in significant measure on *Sable Communications of California v. FCC*, 492 U.S. 115 (1989) for the assertion that the CDA provisions are unconstitutional on their face. In *Sable*, this Court held that a TOTAL BAN on indecent telephone communications was not narrowly tailored to serve the admittedly compelling interest of shielding minors from such communications.

[54] *R.A.V. v. City of St. Paul*, 505 U.S. 377 at 381 (1992).

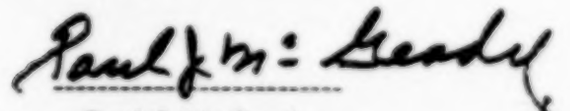
[55] *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, at 58 (1973)(quoting from *Breard v. Alexandria*, 341 U.S. 622, 642 (1951)).

[56] *Paris Adult Theater*, 413 U.S. at 59-60 (quoting from *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Mr. Chief Justice Warren, dissenting)]. Amicus would contend that the CDA provisions can thus properly be viewed as "content neutral" time, place and manner restrictions, in that they are justified without reference to the content of the regulated speech.

[57] *Rosenfeld v. New Jersey*, 408 U.S. at 902 (Burger, C.J., dissenting).

For all of the above, the decision of the Eastern District of Pennsylvania should be reversed.

Respectfully submitted



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January 15, 1997

Supreme Court, U.S.
FILED
JAN 21 1997
CLERK

(8)

No. 96-511

In the

Supreme Court of the United States

October Term, 1996

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,

Appellants,

-vs.-

AMERICAN CIVIL LIBERTIES UNION, *et al.*,

Appellees,

On Appeal from a Three Judge Court of the United States District Court for the Eastern District of Pennsylvania

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QUESTION PRESENTED

In the view of the Family Life Project of the American Center for Law and Justice, the question is:

> Does Congress' adoption of the indecency standard — for regulation of indecent computer communications to children — survive facial constitutional challenge under the First Amendment?

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INTEREST OF THE AMICUS CURIAE*

The American Center for Law and Justice ("ACLJ") is a national, nonprofit pro-life, pro-family and religious liberties organization. The ACLJ works to preserve, protect, and promote religious liberty through education and legal defense.

The Family Life Project of the ACLJ ("Family Life Project") has been organized to focus on the family as the primary social and religious institution of a just society. The Project defends families against efforts to undermine their sovereignty, nature and importance, and to supporting and encouraging all elements in society to work together toward the creation and sustenance of a social order that supports the important work of families: rearing children.

This appeal addresses the serious problem of indecent images and messages readily available to minor children through various electronic communications media, in particular, through computer networks, such as the Internet, and similar and related computer bulletin board services and on-line information systems. The Communications Decency Act ("CDA") is designed to regulate indecent transmissions of electronic images and texts in order to insure that such indecent materials are not available to minor children. The mechanisms of the CDA are important means of protecting children. The proper resolution of this case is a matter of substantial organizational concern to the Family Life Project because of its commitment to families.

The CDA is an essential tool to protect children. It preserves to parents their right to have all the advantages the future holds in online computer networking without requiring that parents risk the exposure of minor children to indecent —

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*. The parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk.

patently offensive depictions or descriptions of sexual or excretory activities or organs — communications. The Project endorses the views expressed by Senator J. James Exon:

> Almighty God, Lord of all life, we praise You for the advancements in computerized communications that we enjoy in our time. Sadly, however, there are those who are littering this information super-highway with obscene, indecent, and destructive pornography. Virtual but virtueless reality is projected in the most twisted, sick misuse of sexuality. Violent people with sexual pathology are able to stalk and harass the innocent. Cyber solicitation of teenagers reveals the dark side of online victimization. Lord, we are profoundly concerned about the impact of this on our children. We have learned from careful study how children can become addicted to pornography at an early age. Their understanding and appreciation of Your gift of sexuality can be denigrated and eventually debilitated. Pornography disallowed in print and the mail is now readily available to young children who learn how to use the computer.
>
> Oh God, help us care for our children. Give us wisdom to create regulations that will protect the innocent. In times past, You have used the Senate to deal with problems of air and water pollution, and the misuse of our natural resources. Lord, give us courage to balance our reverence for freedom of speech with responsibility for what is said and depicted.
>
> Now, guide the Senators when they consider ways of controlling the pollution of computer communications and how to preserve one of our greatest resources: The minds of our children and the future and moral strength of our Nation. Amen.

141 CONG. REC. S8329 (daily ed. June 14, 1995) (quoting Senate Chaplain Lloyd Ogilvie).

SUMMARY OF ARGUMENT

A computer with a modem for telecommunications is truly an eye on the world. As the American Library Association said:

> the Internet serves as the communications medium for literally tens of thousands of global conversations, political debates, and social dialogues. [O]n the Internet, one can view the full text of the Bible, all of the works of Shakespeare, and numberous other classic works of literature. One can browse through paintings from museums around the world, or view in close-up detail the ceiling of the Sistine Chapel, or see the latest photographs trasmitted by the Jupiter space probe. One can even hear pieces of music or view clips of movies and videos over the Internet.

Complaint at ¶ 63, in *ALA, et al. v. United States Dep't of Justice, et al.*, No. 96-1458 (E.D.Pa. 1996).[1] Given that capacity, a computer with a modem for accessing the Internet is understandably considered a great good. No wonder educators recommend equipping students with the means to make use of that good.[2]

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1. The lead case below was *ACLU, et. al. v. Janet Reno*, No. 96-963 (E.D.Pa. 1996).

2. *See Statement Regarding Pornography on the Internet* in "Cyberporn and Children: The Scope of the Problem, The State of the Technology, And The Need for Congressional Action: Hearings on S.892 Before the Committee on the Judiciary" 104th Cong., 1st Sess. (July 24, 1995). The written

Suppose, however, that this great good was used for nefarious purposes. In the months leading up to the enactment of the CDA,[3] Congress confronted substantial evidence that computers, modems, computer networks and the Internet were being used to communicate obscene and indecent messages and images. Having apprised itself of the pervasiveness of indecency purveyed through computer communications, Congress enacted the CDA. Congress crafted the CDA to insure that, while adults remained free to create, view, read and exchange indecent computer communications, minor children would be shielded from such indecency. *See* Argument I, *infra*.

The Appellees argued below that the CDA is not the least restrictive means by which children may be protected from exposure to indecent online communication. Congress collected and considered substantial evidence, however, that current approaches were inadequate to prevent indecent communications to, and with, minor children. Market forces have reposed all responsibility for screening out indecent communications on those who receive such communications, even unwillingly or unintentionally. "Parental control" features of the online computer services (such as America Online, Prodigy, and Compuserve) and software filtering programs (such as NetNanny, SurfWatch and CYBERsitter), have not worked with sufficient effect to secure the government interest

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statements of the witnesses, and a transcript of the hearing are available in the office of the Senate Judiciary Committee.

3. The Communications Decency Act of 1996 was enacted as Title V of the Telecommunications Act of 1996. Pub. L. No. 104-104, 110 Stat. 56 (104th Cong., 2nd Sess., Feb. 6, 1996). Hereinafter the Communications Decency Act is referred to as "the CDA."

in protecting minor children from exposure to indecent communications. *See* Argument II, *infra*.

The CDA survives facial constitutional challenge. It does not ban all indecent computer communications; it only requires those who originate such communications to take responsibility for their availability to minor children. The CDA employs the least restrictive means to limit the accessibility of such materials to children, while leaving in place the opportunity to receive indecent communications and to communicate indecently for those adults who wished to do so. The CDA survives scrutiny of the sort employed by this Court in *Sable Communications v. FCC*, 492 U.S. 115 (1989); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. ___, 135 L.Ed.2d 888 (1996). *See* Argument III, *infra*.

ARGUMENT

I. Congress Was Presented Substantial Evidence Of A Serious Problem Of Indecent Images and Messages Online

On several occasions leading up to the enactment of the CDA, Congress was confronted by evidence that cyberspace--that electronic medium of communications existing in millions of computers, thousands of networks and hundreds of telephone systems--had become the Love Canal of the 1990s. Despite the best and brightest hopes, for good, for progress, for innovation, which inhere to the Internet, to the subordinate components of the Internet, and to other modes of online communication, what Congress discovered was an unrelenting effluent of the perverse, the indecent, the putrescent.

The evidence presented to Congress showed that indecency

and obscenity abounds in the online world. Seamy and unseemly depictions pervade: in graphic image files, in e-mail text messages, and in instantaneous online conversations. For over a year before the CDA was enacted, evidence of the problem of online indecency accumulated in the CONGRESSIONAL RECORD.

On July 26, 1994, Senator J. James Exon offered an amendment, No. 2404, to the Telecommunications Act of 1994. 140 CONG. REC. S9745 (daily ed. July 26, 1994). Sen. Exon stated that the purpose of his amendment was to "help assure that the information superhighway does not turn into a red light district [and to] help protect children from being exposed to obscene, lewd, or indecent messages." *Id.* at S.9746. To buttress his proposal and validate his concern, Sen. Exon caused to be included in the Congressional Record an article from the July 12, 1994 edition of the Los Angeles Times entitled, "Info Superhighway Veers into Pornographic Ditch." *Id.* That article, in turn, reports on a computer security breach at Lawrence Livermore National Laboratory in which computer hackers, including a Livermore employee, used Livermore computers to store and distribute pornography. *Id.* Sen. Exon's remarks marked the beginning of a trail of evidence about online obscenity and indecency.

On June 9, 1995, Sen. Exon spoke in conjunction with an amendment he was submitting for the consideration of the Senate. 141 CONG. REC. S8087-91 (daily ed. June 9, 1995). On that occasion, Sen. Exon presented the now-famous "blue book," which was simply a "sample of what is available" "on the computer, on the information superhighway[.]" 141 CONG. REC. at S.8089. That "blue" book provided a quick and shocking education to members of the Senate about the lewd

and lascivious topics of discussion and subjects of images available free of charge online.[4]

Sen. Exon explained how commercial pornography enterprises used the Internet to boost sales:

> What do these entrepreneurs over here do, Mr. President? What they do is to use the free access, without charge advertising with the best of some of their pornographic, obscene material, and they put it over here on the Internet with their printing press. ... When ... the money-making pornographers enter the free system of advertising, you do not even have to pay the price of going in and sitting down in a seat at a movie theater. What they do is take the best [sic] and most enticing pictures of whatever they want to sell that particular day or that particular week and they enter it over here on the Internet. They are posted on the bulletin board. And those are the ones, those are the pictures, those are the articles that are freely, without charge, accessible to very young children and to anyone else who wants to see them.

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4. Those topics included:

> Multimedia erotica; erotica fetish; nude celebrities; pictures black, erotic females; pictures boys; pictures celebrities; pictures children; pictures erotic children; pictures erotica; pictures erotica amateur; pictures erotica amateur females; pictures erotica amateur males; erotica animal; erotica auto; erotica bestiality; ... bestiality, hamster, duct tape; ... erotica black females; erotica black males; erotica blondes; erotica bondage; erotica breasts. ... Erotica cartoons; erotica children; erotica female; erotica female, anal; erotica fetish; erotica fury; erotica gay men; erotica male; erotica male, anal; erotica Oriental; erotica porn star.

141 CONG. REC. at S8089.

141 CONG. REC. at S8090.

That day Sen. Exon also caused two articles to be printed in the Congressional Record. 141 CONG. REC. at S.8091. One article, "Police Cruise Information Highway," originally appeared in the June 8, 1995, edition of the Omaha World-Herald. The article reports,

> [p]olice in Fresno, Calif[ornia], have a quick and dirty way to show parents how easily their children find sexually explicit material over computers: [t]hey bring parents in for show and tell. Surfing the Internet, police have unearthed sexually graphic conversations, photographs and X-rated movie clips, complete with audio.

141 CONG. REC. at S.8091.

On June 14, 1995, again relying on the "blue book," Sen. Exon addressed the nature of materials available for free through the Internet.

> [I]t is no exaggeration to say that the most disgusting, repulsive pornography is only a few clicks away from any child with a computer. I am not talking just about Playboy and Penthouse magazines. By comparison, those magazines pale in offensiveness with the other things that are readily available. I am talking about the most hardcore, perverse types of pornography, photos, and stories featuring torture, child abuse, and bestiality. These images and stories and conversations are all available in public spaces free of charge.

141 CONG. REC. at S8330 (daily ed. June 14, 1995).

On June 26, 1995, Senator Charles Grassley spoke in support of his legislation, "Protection of Children from Computer Pornography Act of 1995." 141 CONG. REC. at 9017

(daily ed. June 26, 1995). Sen. Grassley spoke to "the availability and the nature of cyberporn." *Id.* He informed the Senate of a Carnegie Mellon University study of visual images available on the Internet:

> [o]f 900,000 images, 83.5 percent of all computerized photographs available on the Internet are pornographic. ... There is a flood of vile pornography, and we must act to stem this growing tide ....

141 CONG. REC. at S9017.

Sen. Grassley also submitted into the Congressional Record two articles detailing the problem.

The first article, "An Electronic Sink of Depravity," first appeared in the American Spectator on February 4, 1995. Through this article, Sen. Grassley placed before the Senate evidence of electronic narratives more grotesque than almost the mind could contemplate (all readily available on the Internet). *Id.* These narratives included particularly disturbing ones, relating stories of torture-murders of little children:

> One is a six-year old boy named Christopher, who, among other indignities, suffers a castration — reported in loving detail — before being shot. The other is a girl named Karen, who is seven years old and is raped repeatedly by no fewer than nine men, before having her nipples cut off and her throat slashed.

141 CONG. REC. at S9018. Congress must have been pained by the information put in the record by Sen. Grassley. No doubt many were motivated to support regulation of obscenity and indecency online because they learned, as Sen. Grassley hoped, that, in the online world, works of electro-fiction describe "fathers sodomizing their three-year-old daughters ... mothers

performing fellatio on their prepubescent sons ... girls coupling with horses ... the giving of enemas to child virgins[.]" *Id.*

Sen. Grassley's second submission was a series of articles related to cyberporn that appeared in Time Magazine in June, 1995. 141 CONG. REC. at S9019-21. From those articles, members of Congress learned how online services are used to distribute graphic images of bizarre sex even to cybervisitors who are not seeking out smutty sex and scatologica.[5]

On July 24, 1995, the Senate Judiciary Committee conducted a hearing, "Cyberporn and Children: The Scope of the Problem, The State of the Technology and the Need for Congressional Action."[6] The hearing was conducted in

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5. For example, the article reports about an incident involving a ten-year old participating in a "chat room" offered by America Online for children ("the Treehouse"):

> [The] [t]en-year-old ..., a student at the Dalton School in New York City who likes to hang out with other kids in the Treehouse chat room on America Online, got E-mail from a stranger that contained a mysterious file with instructions for how to download it. He followed the instructions, and then he called his mom. When [his mother] opened the file, the computer screen filled with 10 thumbnail-size pictures showing couples engaged in various acts of sodomy, heterosexual intercourse and lesbian sex.

141 CONG. REC. at S9019-20.

6. The witness list for the hearing and copies of the written submissions of the witnesses are available through the Senate Judiciary Committee. The hearing transcript and submissions will be published as "Cyberporn and Children: The Scope of the Problem, The State of the Technology, And The Need for Congressional Action: Hearings on S.892 Before the Committee on the Judiciary" 104th Cong., 1st Sess. References to the prepared statements of the witnesses at the hearing are references to copies of those statements, obtained from the Judiciary Committee. Hereinafter, reference will be made to those prepared statements as "Cyberporn Hearing Statements."

connection with the legislation introduced by Senator Grassley the previous month (S. 892). The testimony during the "Cyberporn and Children" hearing further evinced the need for congressional action to address dangers to children from online indecency and obscenity.

One parent, Susan T. Elliott, M.D., recounted her family's experience with online pornography received through America Online.[7] Dr. Elliot explained that "[a] respected teacher suggested that they might benefit from information sharing on the Internet." *Id.* On that recommendation, the Elliot family logged onto America Online, a service choice influenced by the apparent ubiquity of "promotional discs from" that service. *Id.*

Although Dr. Elliot supervised much of her sons' online activities, she was not present when her boys "ventured into the more exciting realm of ... 'private' chat rooms." *Id.* While the Elliot children visited these racy, online speak-easies, "they were offered 'pictures' by other participants[and t]hey accepted a few of these, as did their classmates." *Id.*

What the children received when they downloaded the "pictures" were depictions of "hard core pornography in full color . . . ." *Id.* The Elliots would never have discovered this electro-pornography except that her husband "noted that the memory of [their] computer was rapidly filling up." *Id.* Clearing memory, the Elliots opened up a "'trash' file and found the graphics in question. They portrayed varying numbers of humans and animals engaged in a horrifying gamut of sexual

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7. *See Statement Regarding Pornography on the Internet* in "Cyberporn Hearing Statements."

activities. The pictures were lewd and obscene by any standards." *Id.*

The testimony of Dr. Elliot did not stand alone.[8] The Elliots experienced the problem of unsolicited invitations to obtain "pictures." But others who testified experienced or observed even more ominous predatory behavior.

Donelle Gruff testified that while logged on one computer bulletin board system (BBS), a cybervisitor using the name "Bill" logged onto the online conference she was in and invited everyone to call his BBS.[9] What Donelle got when she signed onto Bill's BBS was more than she wanted: after "a couple of days he started asking me personal questions" such as "what bra size do I wear" and "would I blow him[?]" *Id.* Donelle signed off Bill's BBS and returned to the one where she first learned of Bill's BBS. *Id.*

Bill immediately followed Donelle, electronically, to the other BBS, where he "kept telling [her] he was going to come

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8. Nor did the evidence received by Congress at that hearing, or otherwise, show that such predatory behavior was limited to efforts to affect young men. Another mother testified about an incident involving her daughter and her daughter's friends:

> Early this summer, my thirteen-year old daughter went to her friend's house ... to play on the computer. They were in the neighborhood; they were properly supervised; and I knew they were safe. It was shocking to discover later what they had experienced that afternoon.
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> The girls were in a teenage chatroom on America Online, and were propositioned for "cybersex". Initially, they thought it was funny, giggling as you'd expect thirteen-year olds would, but as the requests became raunchier, they were frightened.

See Child Pornography on the Internet in "Cyberporn Hearing Testimony."

9. *See* "Statement of Donelle Gruff" in Cyberporn Hearing Statements.

to [her] house." *Id.* Late that night, Bill showed up at Donelle's house. *Id.* Over the next two days, Bill returned to her house at least twice, even though police had been called to the scene. *Id.* On the weekend, Bill followed Donelle for several hours while she was with friends at a bowling alley. *Id.* Later, he tried to manipulate Donelle's computer electronically, including an attempt to force download pornographic pictures, one of which was transmitted to Donelle's computer and subsequently turned over to police. *Id.*

In the testimony of Donelle Gruff, Congress confronted evidence of indecent electronic instantaneous messages (soliciting her participation in sex acts), with electronic and electronically-assisted stalking, and with indecent graphic images being transmitted to unwilling recipients. Another witness documented the nonchalant approach of one online service to the problem of pervasive indecency in instantaneous online communications.

Barry F. Crimmins purchased a computer and signed onto America Online.[10] Eventually, because he was an adult survivor of childhood sexual abuse and had heard of America Online's chatrooms for adult survivors, he took advantage of America Online's "People Connection," through which the chatrooms are entered for instantaneous online conversation. *Id.* at 4. As Crimmins reviewed a list of chatroom names, he discovered

> numerous atrocious rooms. Many were obviously created by, and for, pedophiles. There were rooms promoting rape, incest, the exchange of child pornography, hate crimes, and every possible, and in some cases impossible,

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10. *See Testimony of Barry F. Crimmins* in "Cyberporn Hearing Statements."

> sexual activity. ... The first time [he] found the Abuse Survivors' room, it was located between a room called "DadsNDaughtrs" and another entitled "lilboypix."

Id. at 5.

Crimmins testified that he had "been sent over a thousand pornographic photographs of children via" America Online. *Id.* Crimmins testified about the many chatrooms in which online indecency is concentrated on America Online.[11]

Believing that America Online ought to take responsibility for the things that occur within its cyberspace, Crimmins engaged in a long effort of correspondence seeking to obtain action by America Online to minimize or eliminate the pervasive pedophillic pornography online. *Id.* at 9-11, 13-21. Ultimately Crimmins found America Online indolent and unresponsive. He summarized his feelings thus: "I am here to tell the American people that not only are their children unsafe on AOL, their children are unsafe because of it." *Id.* at 11.

While considering the CDA and Sen. Grassley's legislation, Congress had before it clear evidence that indecent and obscene online communications were like crude pollutants, were causing or threatening to cause real injury to minor children and to unwitting adults. The facts put before Congress grew

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11. Crimmins testified about rooms such as "Nudist families," "Incest is best," "Have hot stepdaughter," *id.* at 6-7, "Hot4 auntie[,]" [sic] "boys in undies pics[,]" "Rape fantasy[,]" "hairless little vulvas[,]" "found pics of sis[,]" "dremz of little girls[,]" "teen masturbation[,]" "Likes em under 12[,]" "girls underwear pics wntd[,]" "teen incest stories[,]" "My sis caught mechild pooorn[,]" and "Dads4 sons incest[,]" *id.* at 22. In such rooms, Crimmins testified, "child pornography is exchanged, and incest is ... celebrated." "Cyberporn Hearing Statements" at 7.

irrebuttably to proof that the Internet, the online services, and the smaller computer bulletin boards were being used to facilitate a sleazy traffic in crude ruminations, dirty pictures, ominous stalkings, and promiscuous proposals. What remained to be done, and what is discussed below, was to determine whether the marketplace had provided an adequate response to the problem identified by Congress, and to craft an appropriate solution to the problem if necessary.

II. Less Restrictive Means Failed To Address Adequately The Problem Of Indecent Electronic Communications

The ACLU and the ALA have both argued that other means, short of the restrictions on indecent communications contained in the CDA, evince the principle that less restrictive alternatives to the CDA existed. For example, the ALA asserted:

> The online medium offers the recipients of information a degree of control unmatched in any other medium. Not only can users affirmatively select the content of materials they view based on the subject matter of the particular service or the information contained in the headline or subject line, but there are also numerous -- and expanding -- methods for users to screen and block incoming materials they choose not to receive.[12]

Of course there are electronic prophylactics to online indecency. Among these are the "parental control" features built into such online services as America Online, Compuserve and Prodigy.[13]

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12. ALA's Memorandum in support of Preliminary Injunction at 21.

13. *See* Declaration of Sheila A. Burke at ¶¶ 10-13 (Exhibit 8 in support of the ALA's Motion for a Preliminary Injunction).

The "parental control" features *may be used* to:

> 1) block access to all newsgroups on the Internet, 2) block access to a specific newsgroup by entering a specific Internet address, 3)block access to all Internet newsgroups not listed in the AOL index, 4) block access to newsgroups that have ... photographs and sound recordings, and 5) restrict access to newsgroups that contain a particular string of characters, such as "sex" or "nudity," in the Internet addresses.

Id.

There are also various computer software packages *that may be used* to restrict children's access to indecent materials. One popular package, SurfWatch

> is automatically activated when the computer is started, and can only be deactivated with the parent's private password. When a user logs on to the Internet, SurfWatch cross-checks every attempt to access Usenet newsgroups, World Wide Web, gopher and ftp sites, or Internet Relay Chat (IRC) sessions against a list of sites known to contain sexually explicit material. In addition, SurfWatch uses a proprietary pattern recognition technology which blocks access to sites which contain certain words or word strings in their addresses. ... If a user attempts to access a site that is contained on the SurfWatch blocked site list, or a site containing certain key words or phrases, the user is prevented from accessing the site and receives a message indicating the site has been "Blocked By SurfWatch."[14]

14. *See* Declaration of Bill Duvall at ¶¶ 13-14 (Exhibit 14 in support of ALA Plaintiffs' Motion for Preliminary Injunction).

Both approaches described above, as with all other methods of preventing exposure of children to indecent online communications, share two defects. First, they are not sufficient to accomplish the governmental purpose of preventing exposure of children to indecent materials online. Second, they all place the burden of failure on recipients of indecency rather than on creators and transmitters of indecency.

Prior to enacting the CDA, Congress acquired evidence that, even with such prophylactics in place, minor children were being exposed to online indecency. *See* Argument I, *supra*. Congress had the famous "blue book" in front of it; Congress was informed of incidents such as the unsolicited transmission of graphic sex pictures to Anders Urmacher, the Elliot children's dabbling with very dirty pictures, the stalking of Donelle Gruff, the insouciant attitude of America Online to the problems identified by Barry Crimmins.

Also before enactment of the CDA, Congress had been apprised of the prophylactic methods described above. For example, one America Online executive, William Burrington, Assistant General Counsel and Director of Government Affairs, testified at the Cyberporn Hearing.[15] In his written testimony, Mr. Burrington explained the operation of parental controls provided by online services, such as America Online, and also explained about the availability and utility of SurfWatch and other software filters. *Id.* at 8-11.

Congress was aware of the prophylactic methods available for screening online indecency, and that exposure of minor children to online indecency continued to be a problem. It was

15. *See Written Testimony of William W. Burrington* in "Cyberporn Hearing Statements."

reasonable, therefore, for Congress to conclude that the prophylactic methods provided by private market forces were insufficient to meet the needs it had identified. Congress reasoned that the only way to effectively protect minor children from being exposed to online indecency was to shift responsibility from minor children and their parents to those whose conduct created the risk of exposure.

Some may find it inconvenient to guard their language while children are around. Others may suffer physical or psychological defects that strip them of the capacity to choose their words with care. But Congress was entitled to conclude from the evidence that prophylactic methods had failed to accomplish the goal of protecting children — that the market had failed.

The commercial entities responsible for these prophylactic approaches readily acknowledge that their products or approaches to filtering indecency are deficient.[16] For example, Bill Duvall, the Chief Executive Officer of SurfWatch Software, Inc., explained that SurfWatch has to be regularly updated (something which his company will do for a fee) "because the number of sites on the Internet containing sexually explicit material is constantly changing ...."[17] In Duvall's view,

16. Access providers acting like common carriers, "solely ... providing access or connection to or from a facility, system or network under [its] control," are not liable for the "transmission, downloading, intermediate storage, access software, or other related capabilities that are incidental to providing such access or connection" involving indecent material. *See* CDA § 502(e)(1).

17. *See* Declaration of Bill Duvall ¶ 16 (Exhibit 14 in support of the ALA Plaintiffs' Motion for Preliminary Injunction); *see also* Declaration of Nigel

"SurfWatch is a highly effective tool that can enable parents to better protect their children from objectionable material on the Internet." *Id.* at ¶ 22. But Duvall's understanding of "highly effective" is insightful:

> From our estimates, SurfWatch blocks 90 - 95 % of readily accessible sexually explicit sites on the Internet. This estimate is based on the assumption that most sites on the Internet containing sexually explicit material have been identified by our team of "net surfers" and added to the blocked site list, or contain key words in the sites address which are blocked by our pattern recognition technology.

Id. at ¶ 23.

Mr. Duvall's conclusion that SurfWatch was "a highly effective tool" must be tempered by his candid use of terms like "estimates" and "assumption." SurfWatch proceeds from a working hypothesis that "a substantial majority of sexually explicit Internet sites can be identified by one of several common key words in the address (e.g., "sex", "erotic", etc.)." *Id.* But that working hypothesis is not a settled rule. For example, to the extent that sponsors of Internet sites seek to avoid detection by SurfWatch's pattern recognition technology or other filtering software, the filters become ineffective.

Congress had evidence of a problem of online indecency. Congress knew that the indecency flourished even when the nongovernmental prophylactics were applied to the problem. Consequently, Congress correctly concluded that such less restrictive means would be ineffective. That conclusion fully

R. Spicer ¶¶ 24-26 (Exhibit 31 in support of the ALA Plaintiffs' Motion for Preliminary Injunction) (explaining the purposes and mechanics of "Cyber Patrol," another filtering software program).

justified Congress' decision to address the problems of online indecency and obscenity through legislation.[18]

III. The CDA Is Facially Constitutional

A. The CDA's Regulation of Indecent Communications Is Not Vague or Overbroad

Congress enacted the CDA as Title V of the Telecommunications Act of 1996. The CDA requires creators and distributors of indecent materials to take reasonable steps to insure that such materials are not displayed to, or communicated to, minor children. The CDA accomplishes this purpose through two key provisions.

Section 502(1) of the CDA prohibits knowing use of a "telecommunications device" to make or create and "initiate[] the transmission of, any comment, request, suggestion, proposal, image, or other communication which is ... indecent, knowing that the recipient of the communication is under 18 years of age." Section 502(2) of the CDA prohibits knowing use of an "interactive computer service" to make "patently offensive" communications to a specific person or persons under eighteen yeas of age. That section also prohibits knowing use of an "interactive computer service" to "display" "in a manner available to" a person under eighteen years of age

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18. In *Paris Adult Theater v. Slaton*, 413 U.S. 39, 63 (1973), this Court stated:

> Nothing in the Constitution prohibits [government] from reaching [the conclusion that pornography is detrimental to society] and acting on it legislatively simply because there is no conclusive evidence or empirical data. The congressional record developed prior to the enactment of the CDA more than sufficiently supports the CDA's special protection of children.

"patently offensive" communications.[19]

Key to the effective operation and enforcement of these provisions is the meaning of the term "indecency." The legislative history is clear on this point. Congress adopted the meaning of "indecency" given to it in federal court decisions such as *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). *See* H.R. REP. NO. 458, 104th Cong., 2nd Sess. 188 (1996).[20] The Conference Report states:

> The conferees intend that *the term indecency ... has the same meaning as established in FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), and Sable Communications of California, Inc. v. FCC, 492 U.S. 115

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19. In pertinent part, section 502(2) of the CDA provides:

> (d) Whoever-
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> (1) in interstate or foreign communications knowingly-
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> (A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or
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> (B) uses any interactive computer service to display in a manner available to a person under 18 years of age,
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> any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or
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> (2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity,
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> shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.

20. Hereinafter referred to as "Conference Report."

(1989). These cases clearly establish the principle that the federal government has a compelling interest in shielding minors from indecency. Moreover, these cases firmly establish the principle that the indecency standard is fully consistent with the Constitution and specifically limited in its reach so that the term is not unconstitutionally vague.

Conference Report at 188 (emphasis added).

A review of the decisions shows that, in legislative and administrative uses of the term "indecency," although some variations exist, the essence of its meaning is constant. "Indecency" means "patently offensive descriptions of sexual and excretory activities."

As it considered the meaning of "indecency," Congress considered, but rejected, the "harmful to minors" standard. *See* Conference Report at 189 (citing *Ginsberg v. New York*, 390 U.S. 629, 641-43 (1968)). The "harmful to minors" standard was proposed by some who urged the need for such a standard to protect "material with 'serious literary, artistic, political, and scientific value[.]'" Conference Report at 189. In Congress' view, however, use of "harmful to minors" standard was not necessary to protect "'serious literary, artistic, political, and scientific value,'" because material could not be determined to be "patently offensive" "without a consideration of the context" and without showing both "the intention to be patently offensive," and "a patently offensive result." *Id.* (citations omitted).

By adopting the indecency standard from *Pacifica* and *Sable*, Congress showed its intention not to have treated as indecent materials that have "serious redeeming value[,]" that are "intended to edify and educate," that are not designed "to

offend." *Id.* Further, the indecency standard was upheld in *Denver Area*, 518 U.S. ___, 135 L.Ed.2d at 902, where this Court noted that the need to protect children from exposure to patently offensive sex-related material was an "extremely important justification."

B. Indecent Communications Do Not Enjoy Absolute First Amendment Privilege And May Be Regulated By Congress

While this Court has said that "[s]exual expression which is indecent but not obscene is protected by the First Amendment[,]" *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989), it has never held that indecent communications enjoy an absolute First Amendment privilege, or that governments are utterly powerless to respond to the problems associated with indecency. Rather, this Court has said:

> [t]he Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.[21]

Further, the interest that prompted Congress to act, the protection of children, has been recognized by this Court as one which is compelling:

> [w]e have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult

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21. *Sable*, 492 U.S. at 126; *Denver Area*, 135 L.Ed.2d at 902.

standards.[22]

Our Nation's duty to protect children them from harm and equip them for the future, has been recognized as a paramount obligation. With respect to the "dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene . . . ," this Court has stated, "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *New York v. Ferber*, 458 U.S. 747, 753, 758 (1982). Of course, here the indecent images, messages and communications have not *necessarily* been produced with the involvement of children. The threat to children from such indecent materials lies, not in its making, but in its immediacy and its ubiquity.

Technological advances in communications — telephone services, computer bulletin boards, commercial online services, and the Internet — have galloped ahead of governmental regulation. These fast-paced, evolving technologies have been used by those who have materials to communicate that are indecent. Children, at least some of whom are not looking for provocative electronic conversations or salacious portrayals of sexual or excretory activities, have been given ready access to indecent communications.

In response to the serious problem outlined in Argument I, *supra*, Congress did not go overboard and prohibit indecency online. Given *Sable*, Congress knew that a sweeping prohibition would likely have been struck down judicially. Rather than prohibit adults from creating, using, viewing and exchanging indecent materials online, Congress merely shifted the burden of responsibility for indecent communications from

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22. *Sable*, 492 U.S. at 126.

recipients to its creators and distributors.

In *Sable*, this Court struck down a ban on indecent interstate commercial telephone communications, 492 U.S. at 126-31, while affirming a ban on obscene interstate commercial telephone communications, 492 U.S. at 124-26. The CDA, although also targeted at indecency, is quite different in character from the total ban struck in *Sable*. Rather, it follows the permissible form of regulation upheld in *Denver Area*.

In essence, the CDA imposes on creators of indecent communications the same sorts of gatekeeper responsibilities that this Court suggested in *Sable* would both serve the important government interests at stake and avoid unconstitutional restriction on indecent, but protected, communications among adults. Examination of pertinent sections of the CDA shows that it is neither a sweeping ban nor more restrictive of indecent communications than necessary.

Congress did not ban all online indecency. Thus, *Sable* is inapposite. In *Sable*, this Court likened a flat ban on indecent interstate telecommunications to the constitutional equivalent of "burn[ing] the house to roast the pig," *Sable*, 492 U.S. at 127 (citation omitted). Here Congress concluded that it was time to remove from the parlor a few pigs to make room for children who ought not to have been relegated to the pig's pen.

C. The CDA's Regulation Of Indecent Communications Is Facially Constitutional Under *Pacifica*, *Sable*, and *Denver Area*

Congress has not violated the rights of the ACLU or the ALA by enacting the CDA. This Court has approved a system of regulation that does not ban indecent communications but restricts the time, place and manner of their communication so

as to protect minors from exposure to them.

In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), this Court upheld a Federal Communications Commission order that the broadcast of a George Carlin monologue entitled, "Filthy Words," "'was indecent and prohibited by 18 USC [§] 1464.'" 438 U.S. at 732 (citation omitted). What this Court had to say about "indecent" radio broadcasting, and regulatory restrictions thereof, provides valuable guidance here. Unlike *Sable*, *Pacifica Foundation* addresses regulation of indecency, not its complete prohibition. In that respect, the reasoning in *Pacifica Foundation* is directed to analogous concerns.

At issue in *Pacifica Foundation*, Title 18 U.S.C. § 1464 prohibits the use of "any obscene, indecent, or profane language by means of radio communication." The FCC concluded that "the language used in the Carlin monologue [w]as 'patently offensive,' though not necessarily obscene ...." 438 U.S. at 731 (citation omitted). For the Commission, which was admittedly seeking to restrict the availability of such materials to children, the context of the broadcast of the monologue was key: it was "'broadcast at a time when children were undoubtedly in the audience ....'" 438 U.S. at 732 (citations omitted). After its order issued, the Commission clarified its order, stating it "'never intended to place an *absolute prohibition* on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it.'" 438 U.S. at 733 (citations omitted, emphasis added).

In *Pacifica*, this Court undertook the tasks of defining "indecent," 438 U.S. at 739-41, and of weighing the constitutionality of the Commission's judgment that "Filthy Words" was a prohibited broadcast of "indecent" language. In

this Court, Pacifica Foundation argued that the Commission had misunderstood the ban on radio broadcasting of "obscene, indecent, or profane" language. 438 U.S. at 739-40. Pacifica argued that the term "indecent" had the same meaning as the term "obscene." *Id.* In Pacifica's view, the absence of any prurient appeal in "Filthy Words" and the Commission's hesitance to declare the monologue obscene should have placed the monologue outside of the scope of the statutory ban on broadcasts of "obscene, indecent, or profane" language. *Id.*

This Court was not persuaded by Pacifica's arguments; the Court relied on the commonly accepted meaning and dictionary definition of "indecent." "[T]he normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality." 438 U.S. at 740.[23]

Having arrived at its workable definition for "indecent," and concluding that "the content of Pacifica's broadcast was 'vulgar,' 'offensive,' and 'shocking[,]'" 438 U.S. at 747, this Court then considered the context of the broadcast "because content of that character is not entitled to absolute constitutional protection under all circumstances ...." *Id.* This Court has "long recognized that each medium of expression presents special First Amendment problems[,]" 438 U.S. at 748 (citation omitted). With respect to the broadcast of "Filthy Words," this Court reasoned that even though some quite offensive written

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23. To give content to "indecent," this Court looked to the dictionary:

> Webster defines the term as "a: altogether unbecoming: contrary to what the nature of things or what circumstances would dictate as right or expected or appropriate: hardly suitable: UNSEEMLY ... b: not conforming to generally accepted standards of morality; ....

438 U.S. 740 n.14 (quoting Webster's Third New International Dictionary (1966)).

message "might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant." 438 U.S. at 749. Although irony in an opinion of This Court can be an effective forensic device, Congress enacted the CDA to cure a real problem, not a rhetorical one.

In context, "Filthy Words" was patently offensive. In *Pacifica Foundation*, this Court found the FCC's conclusions, that the monologue was indecent and that its broadcast violated federal law, fully justified. Similarly, the indecent communications that are ubiquitous online fully justify Congress' decision to enact the CDA. The Act "does not by any means reduce adults to [communicating] only what is fit for children ...." 438 U.S. at 750 n.28 (citing *Butler v. Michigan*, 352 U.S. 380 (1957)). Instead, adults will continue to have available to them a panoply of indecent matter.

Just last Term, this Court upheld the indecency standard in *Denver Area*, 518 U.S. at ___, 135 L.Ed.2d at 902. In that case, cable operators could prohibit the broadcasting of indecent materials on leased access channels — channels which federal law required cable operators to reserve for commercial lease by unaffiliated third-parties — when the operator reasonably believed to describe or depict sexual or excretory activities or organs in a "patently offensive" manner. This Court explained that the problem Congress attacked in passage of section 10(c) of the Cable Television Consumer Protection and Competition Act of 1992 (47 U.S.C. § 532(h)) was

> remarkably similar to the problem addressed by the Federal Communications Commission in *Pacifica*, and the balance Congress struct is commensurate with the balance [it] approved there.

Denver Area, 518 U.S. at ___, 135 L.Ed.2d at 903. That balance considers the unique and pervasive presence of the service, and its easy access to children, with the desire of adults to obtain and have access to indecent materials. Where the desire of adults, however, for protected indecent material on the Internet can be met with identification and membership procedures among others, to the desired website, the regulations of the CDA are fully commensurate *Pacifica* and *Denver Area* and the First Amendment.

Enactment of the CDA does not mean that indecent electronic communications will become unavailable. Under the standard Congress chose for "indecency," the term is applicable only to those materials created with "the intention to be patently offensive," and which showed "a patently offensive result." *See* Conference Report at 189. All that the creators and users of online indecency must now do is either avoid communicating indecency to children or posting indecent materials where children can have access to them or avoid commerce in materials that are intentionally patently offensive and produce "a patently offensive result."

Online indecency has not been proscribed. It has been regulated because of our the need to protect children from it. The manner of regulation, permitting uses and exchanges of it among adults, is the least restrictive one available that will accomplish the important government purpose of protecting children. Inapposite appeals to the First Amendment cannot indecency from reasonable regulation. The CDA is constitutional on its face.

CONCLUSION

The judgment below should be reversed.

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January 21, 1997.

(9)

No. 96-511

Supreme Court, U.S.
FILED
JAN 21 1997
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JANET RENO, *et al.*,

Appellants,

v.

AMERICAN CIVIL LIBERTIES UNION, *et al.*,

Appellees.

On Appeal From The United States District Court
For The Eastern District Of Pennsylvania

BRIEF *AMICI CURIAE* OF ENOUGH IS ENOUGH, THE SALVATION ARMY, NATIONAL POLITICAL CONGRESS OF BLACK WOMEN, INC., THE NATIONAL COUNCIL OF CATHOLIC WOMEN, VICTIMS' ASSISTANCE LEGAL ORGANIZATION, CHILDHELP USA, LEGAL PAD ENTERPRISES, INC., FOCUS ON THE FAMILY, THE NATIONAL COALITION FOR THE PROTECTION OF CHILDREN AND FAMILIES *(and other amici listed on inside cover)* IN SUPPORT OF APPELLANTS

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IN THE

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OCTOBER TERM, 1996

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v.

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Appellees.

On Appeal From The United States District Court For The Eastern District of Pennsylvania

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BRIEF *AMICI CURIAE* IN SUPPORT OF APPELLANTS

INTEREST OF *AMICI CURIAE*

Pursuant to Rule 37.3 of this Court, Enough Is Enough, *et al.* respectfully submit this brief *amici curiae* in support of Appellants. Written consent to the filing of this brief has been granted by counsel for all parties. Letters of consent have been lodged with the Clerk.

Amici comprise a broad coalition of public interest groups and individuals committed to advocating legal and social reforms that advance and defend women and children against sexual exploitation, abuse, and degradation. While representing diverse political perspectives, we are agreed that this

this Court's decision in the instant case will directly affect the welfare of our society. A detailed description of the interests of those represented herein is set forth in the Appendix. We believe that our perspective will complement the briefs of the parties and assist the Court in the sound resolution of this case.

SUMMARY OF ARGUMENT

The Internet is transforming how Americans communicate and learn.[1] Because children often demonstrate a proficiency in computer skills surpassing that of their parents, the Internet is quickly becoming a medium of the young. Indeed, evidence indicates that the Internet is "more powerful in attracting the attention of children and youth than any other prior electronic

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[1] Nielsen Media Research Interactive Services, *Internet Hyper-Growth Continues, Fueled by New, Mainstream Users*, Aug. 13, 1996, at HTTP://www.nielsen.com (reporting that Internet access in the United States and Canadian population is up by 50% from August/September 1995 to March/April 1996); Nielsen Media Research Interactive Services, *The Commercenet/Nielsen Internet Demographics Survey*, (Aug. 13, 1996) at HTTP://www.nielsen.com (reporting that 37 million people, age 16 and older in the U.S. and Canada, have access to the Internet and that among them males compose 66% of Internet users and account for 77% of Internet usage); Fred Katayama, *The Not-So-Worldly Web*, CNN: The Financial Network (Dec. 17, 1996) at HTTP://www.cnnfn.com/hot-stories/deals/9612/17/worldwide_web_pkg/index.htm) (reporting that two-thirds of the world's "on-line" households are in North America and only 15% are in Europe or Asia); *Oversight Hearing on the High Performance Computing and Communications Program and Uses of the Information Highway, before the Subcomm. on Science, Technology, and Space of the Senate Comm. on Commerce, Science, and Trans.*, 104th Cong., 1st Sess. 26 (1995) (noting that in 1994, more personal computers were sold for home use in the United States than television sets and that Internet usage in this country grows by 10% per month).

system."[2] Along with its unique opportunities, however, the Internet carries unique threats. The Department of Justice has succinctly identified the most serious danger:

> Never before in the history of telecommunications media in the United States has so much indecent (and obscene) material been so easily accessible by so many minors in so many American homes with so few restrictions.[3]

Because this unprecedented rise in the quantity of sexually-explicit speech available to children threatens their welfare, the stakes in this proceeding could not be any higher. In a more innocent age the Court was concerned "not to reduce the adult population . . . to reading only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 381 (1957). Today, unfortunately, the opposite concern is more apt—that we not condemn children to reading only what is fit for adults. In the decision below, the court's response to this concern is troubling. Judge Dalzell, for example, described the Communications Decency Act as a cure worse than the disease, questioning whether Congress had identified a harm in genuine need of treatment: "[H]ere, however, I am hard-pressed even to identify the disease." *ACLU v. Reno*, 929 F. Supp. 824, 881 (1996). Had the district court more carefully considered how sexually-explicit material on the Internet endangers children, the court would not have found that Appellee's constitutional interests so easily outweigh the

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[2] Kathryn Montgomery & Shelley Pasnick, Center for Media Education, *Web of Deception* (Mar. 1996).

[3] *U.S. Department of Justice, Post Hearing Memorandum of Points and Authorities*, at 1, *ACLU v. Reno*, 929 F. Supp. 824 (1996).

Government's compelling interest in protecting children from such harm.

Sexually-explicit material on the Internet poses a unique danger to children, demanding an innovative response from Congress. In its prior decisions, this Court has confirmed Congress's authority to address compelling concerns by enacting laws adapting the application of the Free Speech Clause in a novel communications medium. The Internet's capacity to collect information from numberless sources enables children to view endless amounts of sexually-explicit material without leaving home. As we will show, a significant body of carefully-documented research demonstrates that exposure to sexually-explicit material substantially harms children. Without effective laws to prohibit the distribution of such material to children, many children will suffer the harms we describe. That tragic result cannot be reconciled with Appellee's asserted interest in preserving unrestricted access by children to sexually-explicit materials over the Internet.

The Court can vindicate the Government's compelling interest in protecting children within the limits set by the First Amendment. We urge that the Government's compelling interest in protecting children be given the predominant weight it deserves in this communications medium. A less careful approach by the Court will leave children unprotected in the Internet jungle.

ARGUMENT

I. SETTLED FIRST AMENDMENT PRINCIPLES SUPPORT THE GOVERNMENT'S PROHIBITION OF THE DISTRIBUTION OF SEXUALLY-EXPLICIT SPEECH TO CHILDREN OVER THE INTERNET.

The First Amendment permits Government to regulate sexually-explicit but non-obscene speech to promote a compelling interest where it has chosen the least restrictive means of effective regulation. *See Sable Communications v. FCC*, 492 U.S. 115, 126 (1989). The Government's compelling interest springs from the harms visited upon children from their access to sexually-explicit material. As *Amici* demonstrate below, "the recited harms are real, not merely conjectural," and the regulation will "alleviate these harms in a direct and material way." *United States v. National Treasury Employees Union*, 115 S.Ct. 1003, 1017 (1995). We document herein the kinds of injuries that exposure to sexually-explicit materials inflict on children and show how the CDA provides a necessary and feasible means of protecting children from such harm.

Under this Court's precedents, protecting children from exposure to harmful sexually-explicit materials undeniably qualifies as a compelling state interest. "It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" *New York v. Ferber*, 458 U.S. 747, 756-57 (1982)) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)). Moreover, as the Court has explained, "This interest extends to shielding minors from the

influence of literature that is not obscene by adult standards." *Sable*, 492 U.S. at 126. On this score, Justice Scalia has explained that the Government's interest in preventing children from exposure to technically non-obscene sexually-explicit material increases as the category of obscenity comes to be defined more and more narrowly. *See id.* at 132 (Scalia, J., concurring).

Further, where a *communications medium* is being regulated, the characteristics of the specific technology may be assessed in examining the constitutionality of the regulation. *See, e.g., Kovacs v. Cooper*, 336 U.S. 77, 97 (1949); *Turner Broadcasting Sys., Inc. v. FCC*, 114 S.Ct. 2445, 2456 (1994); *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 749 (1978) ("We have long recognized that each medium of expression presents special First Amendment problems") (citation omitted); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) ("Different communications media are treated differently for First Amendment purposes."). This line of cases leaves room to tailor Free Speech doctrine to the attributes of a particular communications medium such as the Internet.

Against the background of these doctrinal parameters, we consider below the nature of the Internet, its accessibility to children, the harmful effects of indecent and obscene materials on children, and the feasibility of technological protections. This analysis will demonstrate that the district court gravely undervalued the nature of the Government interest at stake and, therefore, erred in its assessment of the CDA's constitutionality. Given the paramount stature of that interest, the Court should rule that the Government's interest in protecting children in the context of this communications

medium outweighs countervailing concerns. By upholding the narrowly tailored provisions of the CDA, this Court will clarify that Congress did not infringe upon the values protected by the First Amendment when it acted to protect children against harmful access to, or receipt of, patently offensive, sexually-explicit materials on the Internet.

II. MANY CHILDREN WILL SUFFER GRAVE HARM FROM EXPOSURE TO SEXUALLY-EXPLICIT SPEECH ON THE INTERNET UNLESS ITS DISTRIBUTION OR DISPLAY TO CHILDREN IS RESTRICTED BY LAW.

A. *The Internet Contains Virtually Endless Amounts of Sexually-Explicit Speech that Has Attracted a Large Audience and Produced Enormous Revenues*

By allowing a user to collect information from numberless sources, the Internet in effect gathers together an ocean of sexually-explicit speech, ranging from the mildly titillating to unqualified hard-core pornography. The Web contains more than 600 merchant sites for pornography.[4] This number, however staggering it might first appear, continues to grow. Log-on Data Corporation's Internet patroller, known as Mud Crawler, reports finding approximately 39 new pornographic Web sites *per day*.[5]

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[4] John Simons, *The Web's Dirty Secret*, U.S. News & World Rep., Aug. 19, 1996, at 52.

[5] Log-On Data Corporation, *White Paper on X-Stop*, Oct. 1996.

This vast new pornography resource has already attracted a remarkably large and devoted audience. *U.S. News and World Report* found in 1996 that "about one-fifth of the Web audience . . . says it regularly seeks out adult material online."[6] According to a Nielsen Media Research survey, *Penthouse* magazine has the most popular World Wide Web site on the Internet, registering more than two million visits during a period from December 21, 1995 to January 20, 1996.[7] Like most such sites, *Penthouse* places no restrictions that prevent children from viewing its lurid images.[8]

The prospect of so many eager voyeurs has presented the merchants of sex with an unprecedented commercial opportunity, and they have been cashing in with enormous success. In December, 1996, the *Boston Sunday Globe* reported that pornographic entertainment on the Internet constituted the third largest sector of sales in cyberspace, with

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[6] Simons, U.S. News & World Rep., Aug. 19, 1996, at 52.

[7] Nielsen Media Research Interactive Services, *Internet Hyper-Growth Continues, Fueled by New, Mainstream Users*, Aug. 13, 1996, at HTTP://www.nielsen.com

[8] From Penthouse Magazine's homepage the online visitor can click on a link labeled "hardcore." The "hardcore" link offered: "HARDCORE MANIA: The Internet's only channel to true hardcore action!" A paragraph read: "There is no content beyond this point that should be accessed by children or those being under the legal age in your State, Province or Country! We are not responsible for those traveling through our site beyond this point." Without any credit card or other proof of age requirement to bar them, any child old enough to read a computer screen and operate a mouse could see, among other things, a close-up color picture of a nude woman orally copulating with a nude man. Other images were equally graphic. *See* Penthouse Magazine Homepage at HTTP://www.penthouse.mag.

estimated annual revenues of $100 million.[9] Such marketing success has fueled an increase in the size of the pornography industry—$10 *billion* annually, according to conservative estimates.[10]

These disturbing trends have resonated with the American people. A 1995 *Newsweek* poll found that 85% of Americans are concerned about pornography being too available to young people through the Internet, and 80% are concerned about "virtual stalking" through e-mail messages.[11] *Internet* magazine warns:

> Few parents—no matter how liberal their political views—want their children exposed to some of the material that's freely available at the fringes of the Internet. No educator can deny the problem: With just a few clicks, a youngster can summon images that would be ruled offensive by any school board anywhere.[12]

The public is right to be concerned. As we demonstrate below, exposure to sexually-explicit speech on the Internet will gravely harm children.

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[9] Anthony Flint, *Skin Trade Spreading Across U.S.*, Boston Sunday Globe, Dec. 1, 1996, at A1.

[10] *Id.*

[11] Charles S. Clark, *Regulating the Internet*, CQ Researcher, June 30, 1995, at 565.

[12] *Safe Computing*, Internet, Sept. 1996, at 49.

B. *Many Children Will Be Harmed from Exposure to Sexually-Explicit Speech on the Internet.*

Exposure to pornography harms children. An individual's sexual identity develops gradually through childhood and adolescence. As they grow up, children are especially susceptible to influences affecting their development. Moreover, information about sex in schools, and presumably, in most homes, comes in age-appropriate incremental stages based on what parents, educators, physicians, and social scientists have learned about child development. Pornography distorts this natural development of personality.

> [I]f the early stimulus is pornographic photographs, the adolescent can be conditioned to become aroused through photographs. Once this pairing is rewarded a number of times, it is likely to become permanent. The result to the individual is that it becomes difficult for the person to seek out relations with appropriate persons.[13]

When pornography is readily accessed, this "simple" way to gratify sexual desires can lead to a deviation from healthy development in which "pictures replace people." Because pornography encourages neither tenderness nor caring (and typically quite the opposite), it can negatively influence a

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[13] Jerry Bergman, Ph.D., *The Influence of Pornography on Sexual Development: Three Case Histories*, IX Family Therapy 3, 1982, at 265.

child's understanding of his own sexuality and the sexuality of those around him.[14]

To children, pornography "educates" by presenting new information. That information about human sexuality is not only highly inaccurate, but misleading. Photographs, videos, magazines, and virtual games that depict rape and the dehumanization of females in sexual scenes constitute powerful but deforming tools of sex education. In addition, pornography portrays unhealthy or antisocial kinds of sexual activity, such as sadomasochism, abuse, and humiliation of females, involvement of children, incest, group sex, voyeurism, sexual degradation, bestiality, torture, objectification, and sanction of "the rape myth."[15] Unlike the sort of education provided in a classroom, exposure to pornography teaches children the rudiments of sex without adult supervision or moral guidance.

Pornography inundates children's minds with graphic messages about their own bodies and their own sexuality.[16]

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[14] *See* John O. Mason, Ph.D., Dr. P.H., Assistant Secretary for Health, Address to the Religious Alliance Against Pornography, *The Harm of Pornography*, at 2 (Oct. 26, 1992).

[15] VICTOR CLINE, PORNOGRAPHY'S EFFECTS ON ADULTS & CHILDREN 13 (1994); *see also*, Neil M. Malamuth & Joseph Ceniti, *Repeated Exposure to Violent and Non Violent Pornography: Likelihood of Raping Ratings and Laboratory Aggression Against Women*, 12 Aggressive Behavior 129-37, U.C.L.A. (1985).

[16] Dr. Gary Brooks, assistant chief of psychology service at the Department of Veterans Affairs and awarded the American Psychological Association's 1996 Practitioner of the Year Award for his work in men and masculinity has coined the phrase "Centerfold Syndrome" to describe a

These images create chemically encoded messages on the brain that can remain in a child's memory through adulthood.[17] Children generally do not have a natural sexual capacity until between 10 and 12 years old. Pornography unnaturally accelerates that development. By short-circuiting the normal development process and supplying misinformation about their own sexuality, pornography leaves children confused, changed, and damaged.[18] Indeed, clinical research suggests that exposure to pornography can permanently damage even healthy and innocent children.

> [T]here seems little doubt that there are at least some people—even those who are initially healthy—who can be eventually harmed through repeated exposure to pornography. In my clinical work, I find pre-teen or

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disorder resulting from the constant bombardment with airbrushed sexual images of women. "Men who participate in such activities as centerfold-aided masturbation, watching pornographic films . . . often become deeply depressed." As a result of a steady diet of "regular pornography, men can display such symptoms as voyeurism, objectification (obsessive fetishism over body parts that interferes with the ability to have relationships with an actual person), the need for validation (easily threatened by women and other men), trophyism (treating women as collectibles), and incapable of intimacy. The tragedy of saddling a generation of young people with these stifling symptoms is self-evident. *See* GARY R. BROOKS, PH.D., THE CENTERFOLD SYNDROME (1995).

[17] *See generally*, James L. McGaugh, Univ. of Calif., Irvine, *Preserving the Presence of the Past*, 38 American Psychologist 161 (1983) (concluding that human memory is formed in part by the release of the chemical epinephrine, which, upon emotional arousal, leaves behind an imprint on the brain.).

[18] Interview with Ann Burgess, Professor of Nursing, Univ. of Pennsylvania, (Jan. 15, 1997).

> adolescent males, who are mostly innocent and uninformed, being particularly vulnerable to these negative and addictive effects.[19]

What we know regarding the sexualization of children and the effects of pornography on adults demonstrates that allowing children to consume pornography will have baneful social consequences.

> Our children live in a society whose psychological and social contexts do not stress the differences between adults and children. We may safely assume that media have played an important role in the drive to erase differences between child and adult sexuality . . . . [S]ex is transformed from a dark and profound adult mystery to a product that is available to everyone—let us say, like mouthwash or underarm deodorant. One of the consequences of this has been a rise in teen-age pregnancy . . . . Another and grimmer consequence of adult-like sexual activity among children has been a steady increase in the extent to which youth are afflicted with venereal disease. . . . The traditional restraints against youthful sexual activity cannot have great force in a society that does not, in fact, make a binding distinction between childhood and adulthood.[20]

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[19] VICTOR CLINE, PORNOGRAPHY'S EFFECTS ON ADULTS & CHILDREN 15 (1994); *cf.* Brown v. Board of Educ., 347 U.S. 483, 494 (1954) (concluding that racial discrimination in public schools "affect[s] [children's] hearts and minds in a way unlikely ever to be undone.")

[20] Neil Postman, *The Disappearance of Childhood*, at 137 (1994).

In addition, one of the more insidious attributes of pornography is that it creates an appetite that, for many, is self-perpetuating and addictive.[21] One study revealed that among 932 sex addicts, 90% of the men and 77% of the women reported pornography as significant to their addictions. The study also revealed that two common elements in the early etiology of sexually addictive behavior are childhood sexual abuse and frequent pornography accompanied by masturbation.[22] The habitual or frequent consumption of pornography can result in a diminished satisfaction with milder forms and a corresponding desire for more deviant, violent, paraphiliac, and other illegal materials[23] that are now easily accessible over the Internet in newsgroups free of charge. Finally, exposure to pornography can lessen one's repulsion to it and one's recognition of its potential harms.[24]

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[21] VICTOR CLINE, PORNOGRAPHY EFFECTS: EMPIRICAL & CLINICAL EVIDENCE, at 2-3 (1990); *see also* Ann Burgess, Ph.D., *Pornography—Victims & Perpetrators, Symposium on Media Violence & Pornography*, Proceedings Resource Book and Research Guide 173-83 (1984).

[22] Patrick Carnes, *Don't Call it Love: Recovery from Sexual Addictions*, (1991).

[23] *See* H.J. Eysenck, *Robustness of Experimental Support for the General Theory of Desensitization, in Pornography and Sexual Aggression*, at 314 (1984); D. Zillmann, *Effects of Prolonged Consumption of Pornography, in Pornography: Research Advances and Policy Considerations*, at 129 (1989).

[24] Zillmann, *supra* note 23, at 129.

The danger to children stems, at least partly, from disturbing changes in attitude which pornography causes. Replicated studies have demonstrated that exposure to significant amounts of increasingly graphic forms of pornography has a dramatic effect on how adult consumers view women, sexual abuse, sexual relationships, and sex in general. These studies are virtually unanimous in their conclusions:

> If you expose male subjects to six weeks' worth of standard hard-core pornography . . . you find changes in attitudes towards women. The subjects become more callused towards women. You find a trivialization towards rape, which means after six weeks of exposure, male subjects are less likely to convict for a rape, less likely to give a harsh sentence to a rapist if in fact convicted.[25]

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[25] Edward Donnerstein, Ordinances to Add Pornography to Discrimination Against Women, Statement at Public Hearing of Minneapolis City Council Session (Dec. 12, 1983); *see also* Luis T. Garcia, *Exposures to Pornography and Attitudes About Women and Rape: A Correlative Study*, Vol. 22, 1853, AG, at 382-83 (1986) (finding that "[s]ubjects with a greater degree of exposure to violent sexual materials tended to believe that: (a) women are responsible for preventing their own rape, (b) rapists should not be severely punished, and (c) women should not resist a rape attack; in addition, researchers found that exposure to violent sexual materials correlated significantly with the belief that rapists are normal); Dolf Zillmann, *Effects of Prolonged Consumption of Pornography, in* PORNOGRAPHY: RESEARCH ADVANCES & POLICY CONSIDERATIONS (D. Zillmann & J. Bryant eds., 1989); N. Malamuth & J. Ceniti, *supra* note 39, at 129-137 ("[S]tudy . . . results consistently showed a relationship between one's reported likelihood to rape and responses associated with convicted rapists such as sexual arousal to rape stimuli, callousness attitudes toward rape, beliefs in the rape myths, and hostility towards women").

This dulling of the moral senses can affect the safety of women. As youth consume dramatically greater quantities of pornography, and as the Internet exposes them to a greater range of violent and deviant forms of sexual conduct than ever before available, it is not irrational to fear that society could regress in its sense of the viciousness and immorality of rape. Children and adolescents who "learn" by early exposure to pornography will more easily accept the idea of forced sex as reasonable and justified. Indeed, studies have found that exposure to hard-core pornography has a similar effect on women, who also become less sympathetic to rape victims in the evaluation of rape trials.[26] The biases encouraged by pornography "may contribute to the reluctance of many women to report rape and to the relatively low likelihood that such offenses will be classified as 'founded' cases."[27]

Because pornography encourages sexual expression without responsibility, it endangers children's health. Rates of venereal disease and rape are already extremely high. In the United States, about one in four sexually experienced teenagers acquires an STD every year, resulting in three million cases of teenage STDs.[28] Infectious syphilis rates have more than doubled among teenagers since the mid-1980s. One million American teenage girls become pregnant each

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[26] Daniel Linz, *Exposure to Sexually Explicit Materials and Attitudes Toward Rape: A Comparison of Study Results*, 26(1) J. SEX RES. 50-84 (Feb. 1989).

[27] L. CLARK & D. LEWIS, RAPE: THE PRICE OF COERCIVE SEXUALITY (1977).

[28] *Facts in Brief*, The Alan Guttmacher Institute (1994).

year.[29] As more and more children become exposed not only to soft-core pornography, but also to explicit deviant sexual material, society's youth will learn an extremely dangerous message: sex without responsibility is acceptable. [30]

Besides the health dangers, exposure to pornography threatens to make children the victims of crime. Research gathered over the past few decades demonstrates that pornography contributes to sexual assault, including rape and the molesting of children.[31] Researchers universally acknowledge that sexual violence is at least partly attributable to the consumption of pornography. "Virtually all lab studies establish a causal link between violent pornography and the commission of violence. This relationship is not seriously debated in the research community."[32] The June 1986 Report of the Surgeon General's Workshop: "Pornography and Public Health," reported that "the circumscribed links between exposure to pornography and aggression toward women

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[29] *Id.*

[30] Research has shown that "males who are exposed to a great deal of erotica before the age of 14 are more sexually active and engage in more varied sexual behaviors as adults than is true for males not so exposed." K. E. Davis and G. N. Braucht, *Exposure to Pornography, Character and Sexual Deviance*, 7 Technical Reports of the Commission on Obscenity and Pornography, at 7.

[31] *See* S. Rep. No. 102-372, 102nd Cong., 2nd Sess. 23 (Aug. 12, 1992) (Pornography Victims Compensation Act of 1992, Senate Comm. on the Judiciary).

[32] Edward Donnerstein, *Aggressive Erotica and Violence Against Women*, 19(2) J.PERS. & SOC. PSYCHOL 269-77 (1980).

. . . have been scientifically demonstrated."[33] The reality that repeated exposure to hard-core pornography is a significant factor in the commission of sex crimes against women is reason enough for concern. But sexual violence victimizes children as well as women. Child molesters often use pornography to seduce their prey, to lower the inhibitions of the victim, and as an instruction manual.[34] "Eighty-seven percent of female child molesters and 77% of male child

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[33] *The Report of the Surgeon General's Workshop: Pornography and Public Health*, June 22-24, 1986, at 15-18; *see also* Edward Donnerstein, Statement Made at Public Hearing on Ordinances to Add Pornography as Discrimination Against Women, Minneapolis City Council, Sess. 1, Dec. 12, 1983 (revealing that in his study, "222 undergraduate males were administered an attitudes survey examining pornography use, attitudes, and self-reported likelihood of rape (LR) or using sexual force (LF). Nonviolent pornography was used by 81% of subjects within the previous year, whereas 41% and 35% had used violent and sexually violent pornography respectively. 27% of subjects indicated some likelihood of raping or likelihood of using sexual force. Discriminate function analysis revealed that use of sexually violent pornography and acceptance of interpersonal violence against women were uniquely associated with likelihood of using sexual force and likelihood of raping.")

[34] VICTOR CLINE, PORNOGRAPHY EFFECTS: EMPIRICAL & CLINICAL EVIDENCE, at 2-3 (1990) ("We also have a great deal of information gained from studies treating sex offenders, suggesting that pornography is often used by them as a facilitator or "training manual" in not only acquiring their own deviation, but also as a device to break down the resistance and inhibitions of their victims or targets of molestation—especially when these are children or juveniles"); *see also* Ann Burgess, Ph.D., *Pornography—Victims & Perpetrators, Symposium on Media Violence & Pornography*, Proceedings Resource Book and Research Guide 173-83 (D. Scott ed., 1984).

molesters studied admitted to regular use of hard-core adult pornography."[35]

In short, the scientific research is overwhelming that children are harmed by pornography in a multiplicity of ways. The risk of that harm coming to pass is magnified to an unprecedented degree because of the accessibility to children of indecent and obscene materials on the Internet.

C. *Neither Parental Supervision Nor Software Blocking Programs, Standing Alone, Can Effectively Guard Children From Sexually-Explicit Material on the Internet.*

End-user software blocking programs do not effectively prevent children from accessing on-line pornography.[36] Such software is woefully ineffective because on-line pornography distributors play a "shell game" of setting up new sites whenever they are on a list of blocked sites, and because many children are computer-savvy enough to disable or bypass the software.[37] Even if software could be created that could out-

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[35] W. L. Marshall, Ph.D. , *Pornography and Sexual Offenders*, *in* PORNOGRAPHY: RESEARCH ADVANCES AND POLICY CONSIDERATIONS 189 (D. Zillmann & J. Bryant eds., 1989).

[36] Appellees promote "PICS" (Platform for Internet Content Selection) as a way for content providers to be accountable. Yet PICS is designed to be a completely voluntary system, and still depends upon end- users employing software to make it work.

[37] *See* Carlos Tejada, *Are My Kids Safe*, Wall St. J., Dec. 9, 1996, at R14 (describing how an ingenious teenager posted a message on the Internet, requesting instructions how to disable the filtering software on his home computer, and "received several effective answers").

guess and out-maneuver the best efforts of those who seek to defeat it, its effectiveness would still be limited to those children whose parents had the knowledge and financial resources to use it, along with the money and time to maintain the necessary software updates.[38]

Moreover, even the most diligent parental supervision and the best content-filtering software at home do not prevent a young person determined to find pornography on the Internet. Home computers are only one port of entry into cyberspace. Children can reach the Internet in the homes of their friends and neighbors, where computers may have no filters installed. Last year, two 15-year old boys in St. Petersburg, Florida downloaded pictures of child pornography and bestiality from the Internet onto floppy disks and took them to school, where they then sold them for $5 each.[39] Limited end-user blocking software is available in the marketplace to install on home computers, yet it was clearly ineffective in protecting the Florida youths or their classmates from dangerous material, just as it will be with the millions of other children. This is not surprising, given the reckless attitude of distributors of pornography on the Internet that they bear no legal duty to prevent children from accessing their materials.

Indeed, assuring children filter-free access to the Internet threatens to become an institutionalized policy. The American Library Association, the lead Plaintiff in *ALA v. U.S. Dept. of*

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[38] Kathryn Montgomery & Shelley Pasnick, Center for Media Education, *Web of Deception* (Mar. 1996).

[39] Susan Clary, *2 Teens Charged in Computer Porn Case*, St. Petersburg Times, May 21, 1996, at 3B.

Justice, "discourages public libraries around the country from using blocking software."[40] The American Civil Liberties Union is contemplating suit against a Florida library system for installing filtering software—the very means the ACLU, in its arguments to the court below, claimed are sufficient to protect children from pornography.[41] The Mayor of Lincoln, Nebraska has announced that he "does not think the city should install software filters to block access to offensive materials through Internet links at Lincoln City Libraries computer terminals;" instead, "monitoring Internet use by a youngster is a parent's job."[42] Although parental supervision in a public library may address the danger for some children, it is manifestly impractical for obvious reasons. Rather than run the risks, many parents may steer clear of the public library altogether.

President Clinton has pledged that every American classroom will be connected to the Internet by the year 2000.[43] Parents cannot monitor their children's activities on-line while they are at school. Although some schools have taken advantage of content-filtering software, others have policies that *prohibit* its use. For example, in one school district, a

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[40] Rebecca Vesely, *Library Blocks Porn, and May Block Rights*, Jan. 7, 1997, at HTTP://www.com/news/story/1289 html.

[41] *Id.*

[42] Ann Harrell, *Library Net Access Up to Parents*, Lincoln J. Star, Jan. 7, 1997, at 1A.

[43] President William J. Clinton, *State of the Union Address* (Jan. 23, 1996), HTTP://www.democrats.org.80/bottomline/challenge/state of union.

letter was sent home with students notifying parents that the children will have access to the Internet, that sexually explicit material is potentially accessible, and that the only way parents can be reasonably sure their children are not exposed to material that is "illegal, sexually explicit, or offensive to certain racial or ethnic groups"[44] is to refuse to sign the school's hold harmless agreement—in which case the child would not be given access to the Internet. In this school district, the parents' only options are to risk their children's exposure to harmful material or deny them the educational opportunities offered by the Internet.

For these reasons, the district court's suggestion that "parents can supervise their children's use of the Internet or deny access until they reach an appropriate age," *ACLU v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa. 1996), is untenable. On the one hand, neither parental supervision nor content-filtering software is sufficient to prevent children from accessing pornography on the Internet. On the other hand, denying children access to the Internet deprives them of a vital educational resource. The legal restrictions imposed by the CDA are not only helpful but necessary, if children are to be effectively shielded from pornography and the dangers it poses, while benefitting from the Internet's vast power to convey knowledge.

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[44] Westside (Omaha, NE) Community School's Application for Student Internet Account, *Statement of Rights and Responsibilities* (Amended May 2, 1994).

D. Compliance With The CDA Is Technically Feasible

The district court's conclusion that compliance with the CDA is technically and economically infeasible is erroneous. Judge Dalzell's theoretical predicate for that proposition—that "the strength of the Internet is chaos," *ACLU*, 929 F. Supp. at 883—ignores the essential characteristics of the Internet. Rather than chaos, the defining characteristic of this technology is a critical orderliness, without which it would not work. A programmer attempting to format a Web site in anything other than hypertext markup language (HTML), for example, would produce only incompatibility with the Internet. The Internet "exists and functions as a result of the fact that hundreds of thousands of separate operators of computers and computer networks independently decided to use common data protocols." *Id.* at 832. The word "independent" does not reflect a random, chaotic, or spontaneous coalescing of elements, but rather the conscious decisions of intelligent human beings to align with technical standards promulgated by other intelligent human beings to advance a common objective. It is thus incorrect that the Internet does not contain sufficient orderliness for compliance with the CDA to be feasible.

For instance, the lower court's conclusion that the CDA is unconstitutional was based in part on the perceived difficulties of age-verification, yet the absence of age-verification on the majority of sites on the Internet is the result of the apparent preference of the Internet culture, rather than any technological limitation. That this is so is evident in the number of sites where age-verification is already in place. A

1995 guidebook[45] on Internet law advised Internet Service Providers (ISPs) that "making indecent messages available is not especially risky, as long as they are effectively denied to minors."[46] Some ISPs are already establishing age-restricted areas within their servers for "adults-only" materials.[47]

Many commercial Web sites and bulletin board services that utilize credit card verification currently comply with the CDA.[48] Commercial and non-commercial Web content providers are already beginning to use adult verification

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[45] LANCE ROSE, NETLAW (1995) (written before enactment of the CDA).

[46] *Id.* at iii.

[47] QNSnet is an Internet Service Provider that "restricts access to newsgroups which contain material generally regarded as obscene or pornographic. Access to these groups will only be granted upon presentation of proof of legal age. . . ." *See* QNSnet Terms & Conditions, at HTTP://www.qns.net.80/pricing/termpass.htm.

[48] Unfortunately, however, many commercial sites post free teaser images on their Web sites in an effort to lure subscribers. As a result, by browsing the Web sites of commercial pornographers, children can view an enormous number of sexually explicit pictures without charge. After the CDA passed, but before it was enjoined by the Philadelphia panel, this common practice noticeably ceased. *See, e.g.*, Schmidt, Howard A., 52 Government Exhibits Appended to Direct Testimony Declaration, April 9, 1996, Exhibit nos. 20, 25, 26, 27, & 44 ("If Section 223(d)(1)(B) were upheld as applied to commercial Web sites, most commercial pornographers would likely end their practice of posting sexually explicit material that can be viewed without a credit card or adult ID").

services, [49] digital signatures,[50] and video reflector programs (providing visual verification of age and identity)[51] that allow for age identification.

The Usenet is a controlled access, closed, proprietary, commercial, subscription service that is under the direct control of each ISP, made available by the ISP to its subscribers or users. For an ISP to make any or all Usenet newsgroups available to any of the ISP's users, that ISP must specifically subscribe to and pay for the downfeeds for each news group. Because any ISP in the United States can install and run blocking software on its servers and identify those subscribers or users who are using the ISP's network, the ISP can simply trigger its screening software to exclude access by minors to any or all of the Usenet groups or hierarchies. For example, the University of Oklahoma installed a second newsgroup server, offering one with restricted content available to all users, and one with unrestricted content available only to users identified as at least 18 years old.[52]

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[49] Simons, *supra* note 4, at 52 ("sex also has had an effect on other high-tech markets, ushering in companies that create blocking software and a host of enterprises that authorize digital ID cards. For a monthly or annual fee, these firms verify a Web surfer's age, then issue an identification number that the customer must type in before entering sites that are closed off to underage users").

[50] Utah Digital Signature Act, 46 Utah Code Ann. Ch.3 (1996).

[51] *See Enhanced CU-SeeMe* at HTTP://www.cu-seeme.com. *in White Pine Software Homepage* at HTTP://www.wpine.com.

[52] Pamela Mendels, *Newsgroup Smut Poses Campus Quandary*, N.Y. Times, Dec. 29, 1996.

Other incongruities in the district court's rationale further undercut its logic. For example, while insisting that compliance with the CDA is "either technologically impossible or economically prohibitive," *ACLU*, 929 F. Supp. at 854, or that as yet "no defense is technologically feasible," *id.* at 859, the lower court ignores the provisions of 47 U.S.C. §223 (a)(1)(B). That section proscribes the act of ***knowingly*** initiating the transmission of indecent (or obscene) images or communications "***knowing*** that the recipient of the communication is under 18 years of age" (emphasis added). Obviously, it requires neither technological ingenuity nor economic resources for a pornographer to refrain from sending inappropriate material to someone known to be under 18 years of age. Moreover, the fact that extant obscenity and child pornography laws apply in cyberspace already, yet have not been challenged as technologically or economically unfeasible, further undermines the lower court's argument.[53] As one commentator has argued:

> Internet content and access providers are no more or less able to prevent obscene communications or child pornography from reaching minors (or adults) than they are able to restrict delivery to minors of indecent communication. The arguments made by the plaintiffs in the CDA case about the inability to monitor or control indecent content apply with equal force to monitoring and controlling obscene content; and yet they are not sufficient in the latter context, since both federal and state governments may criminalize obscene communications in any medium. Since content providers

[53] Clapes, Anthony L., *The Wages of Sin: Pornography and Internet Providers*, Computer Lawyer at 8, July 1996.

> and service providers must provide solutions to the problem of obscenity and child pornography, since those solutions are likely to be equally effective in regulating indecent or patently offensive expression as well, the technological impossibility argument is not necessarily a persuasive argument, either factually or legally.[54]

In short, if Internet providers have the technical wherewithal to shield material from children that is technically obscene, then *a fortiori* the technology exists to protect minors from non-obscene but sexually-explicit material. Put another way, the "technical infeasibility" argument proves too much: if valid, it would prove that Internet providers are incapable of adhering to laws designed to prohibit *obscene* materials from being distributed to minors, when that proposition is disputed by no one.

III. TO RESOLVE THE CONSTITUTIONALITY OF THE CDA THIS COURT SHOULD GIVE PARAMOUNT WEIGHT TO THE GOVERNMENT'S INTEREST IN PROTECTING CHILDREN FROM THE DISTRIBUTION OF SEXUALLY-EXPLICIT MATERIAL ON THE INTERNET.

As the research we have documented above shows, exposure to the kinds of sexually-explicit speech centrally covered by the CDA will gravely harm children. The district court erred in failing to apprehend the magnitude of this danger in the unique context of the Internet. This is

[54] Clapes, *supra* note 53, at 9.

the compelling factual predicate that should undergird this Court's resolution of this case.

Because of the unparalleled nature of the Internet, the Court's precedents offer helpful guidance but not a determinative rule. It is clear the Government has a compelling interest in protecting children from the dangers posed by exposure to sexually-explicit materials. *See, e.g., New York v. Ferber*, 458 U.S. 747, 756-57 (1982). The voluminous research we have cited demonstrates beyond cavil that the threat of this harm to children is genuine and not exagerated. *See United States v. National Treasury Employees Union*, 115 S.Ct. 1003, 1017 (1995). Moreover, when applying the First Amendment Free Speech Clause in a new communications medium, the Court has left itself room to fashion rules that fit both the constitutional demand for free speech and the nature of the medium. *See Turner Broadcasting Sys., Inc. v. FCC*, 114 S.Ct. 2445, 2456 (1994). Such a context-sensitive reading of the First Amendment in this case is in keeping with the Court's recent interpretation of the Free Speech Clause in *Denver Area Educational Tele-Communications Consortium, Inc. v. FCC*, 116 S.Ct. 2374 (1996):

> [T]he First Amendment embodies an overarching commitment to protect speech from Government regulation through close judicial scrutiny, thereby enforcing the Constitution's constraints, but without imposing judicial formulae so rigid that they become a straightjacket that disables Government from responding to serious problems. This Court, in different contexts, has consistently held that the Government may directly regulate speech to address

> extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech.

Id. at 2385.

If ever Congress were confronted with the necessity to "address [an] extraordinary problem[]," *id.*, the regulation of patently offensive materials to children over the Internet is such a case. With the CDA, Congress responded to this concern in the only appropriate way in light of the gravity of the danger to children posed by the distribution of sexually-explicit material. This prohibition affects only as much speech as it must to accomplish its purposes, for no lesser approach is commensurate with the unique nature of the danger to children that distribution of sexually-explicit materials over the Internet poses.

The Court has sufficient flexibility under its prior cases to properly vindicate both the profoundly compelling governmental interest at stake in this case, and the requirements of the First Amendment. When the Court applies the strict scrutiny test, it should give the Government's interest in protecting children the paramount weight it deserves. Under that approach the Court should weigh the cost and inconvenience of preventing children from obtaining access to patently offensive materials against the grievous harm such access would cause, and hold that the safe harbors available under the CDA are sufficiently flexible to prevent the statute from becoming constitutionally vulnerable. With this context-sensitive approach, the Court will have acknowledged the unique

danger posed by the distribution of such speech over the Internet by fashioning a rule that affords children the protection they deserve.

CONCLUSION

The Court should reverse the district court judgment that the CDA is unconstitutional and remove the injunction that now blocks its enforcement.

Respectfully submitted,

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January 21, 1997

APPENDIX

Enough is Enough (EIE), launched in November 1992, is a non-partisan, non-profit, educational organization whose mission is to restore a social environment in which citizens are free to raise their children and conduct their lives without the intrusion of illegal sexual material or sexual predators. To achieve this vision, EIE educates the public about the existence, availability, and dangers of pornography; enlists public support to make pornographic material unavailable to children; and encourages community efforts to treat pornography's victims. EIE's principal operational goal in 1997 is making the Internet safe for children.

Enough is Enough has been recognized as the leading national anti-pornography organization addressing the issue of computer pornography and child safety on the Internet. Active in drafting and supporting the Communications Decency Act, EIE has fielded over 1,000 media interviews since June 1995. EIE has testified on numerous occasions before House and Senate Committees on a variety of anti-pornography and child protection measures. EIE has also been active in assisting state and local officials to strengthen city ordinances governing sexually-oriented businesses, providing referrals for victim's assistance, and co-sponsoring conferences for pastoral staff and lay leaders, therapists, psychologists and couples on "Understanding Sexual Trauma." Individuals involved with EIE come from varied backgrounds, professions, religions, non-profit organizations and political affiliations.

Childhelp USA, headquartered in Scottsdale, Arizona, has come to the aid of children in distress since 1959. Childhelp is committed to fighting child abuse and neglect with research, treatment, and prevention programs. Childhelp operated the National Child Abuse Hotline (1-800-4-A-CHILD and 1-800-2-A-CHILD for the hearing impaired with TDD equipment), the Nation's only 50-state, 24-hour, toll-free crisis intervention program. The Hotline is staffed by trained counselors and has a data bank of over 63,000 service providers across the country. Childhelp also operates two

residential treatment facilities for the most severely physically and sexually abused children ages 2 through 12. One is located in southern California and one in central Virginia. Childhelp also operates two sexual abuse advocacy centers, one in Knoxville, Tennessee and one in Manhattan, New York. Other services include therapeutic foster homes, Head Start programs, group programs for teen and adult survivors of abuse, training programs for child care workers and foster parents, and education and advocacy initiatives.

Citizens for Family Friendly Libraries (Georgia) (CFFL) was established in 1994 by Jennifer Toombs and Judy Craft. Its objectives are to return local tax-funded libraries to taxpayer control and to protect children from pornography. Currently, CFFL carries out its mission by countering the public libraries' ever-increasing trend toward providing all material to all patrons, including children, no matter how sexually explicit. Because many public libraries are now providing Internet service, the Internet is of particular concern to CFFL.

Computer Power Corporation (CPC) is an Electrical and Electronic Service Company that specializes in Power Quality, Ground Testing, Communications and Technical Systems Management, and operates a state- accredited educational program. CPC supports the CDA and urges that parents, administrators, teachers, the legal community, and the technology industry work together to responsibly manage the Internet for the protection of America's children from pornographers and pedophiles.

D/TEX Investigative Consulting (D/TEX) is dedicated to providing the finest investigative consulting services to decision-makers in the business, financial, and legal communities. D/TEX specializes in many kinds of investigation services, from locating individuals for legal services to commercial and fraud investigations. D/TEX also offers Due Diligence Services and various Consulting Services. In addition, D/TEX tracks criminal activity on the Internet, including illegal use of the Internet by pedophiles.

Family Friendly Libraries (FFL) is a national grassroots network of concerned citizens, librarians and library trustees that believe: (1) in more common sense access policies to protect children from exposure to age-inappropriate materials without parental consent, and (2) in a return to policies placing libraries under maximum local control with more acknowledgment of taxpayer authority and community standards. FFL is non-sectarian, non-profit and educational. Its overall purpose is to unite communities through appeal to society's long-standing responsibility to protect children from harmful or age-inappropriate material, and to adopt parental rights policies that empower parents while advancing democracy by encouraging citizen involvement in the local taxpayer-funded public library decision process. Located in Springfield, Virginia, FFL offers information, advice and encouragement to callers concerned about local public school and library policy. FFL offers solutions that include changes in local or state statutes involving library policies, harmful to minors laws, and parental rights. While FFL does *not* support censorship or encourage removal of collection material, it *does* call upon library professionals to act responsibly to uphold community standards and protect the community's children.

Focus on the Family is a Christian, non-profit organization committed to strengthening the emotional, psychological and spiritual health of children and their families in the United States and throughout the world. Focus on the Family's President, Dr. James C. Dobson, a renowned child psychologist, served on the Attorney General's Commission on Pornography in 1986. Focus on the Family has produced two major videos, "A Winnable War" and "Fatal Addiction." It has also assisted in one book, *Pornography: A Human Tragedy* which directly discusses the harms of pornography to children, men, women and families in America. The videos and book have been seen and read by thousands of concerned citizens nationwide. Focus on the Family daily radio broadcasts dealing with family concerns and interests are heard by more than one million people daily over 1,500 stations. Its monthly magazine has a circulation of 2.1 million. Focus on the Family regularly receives letters and telephone calls from and counsels with families who have

children devastated by pornography, molestation and abuse. Focus on the Family works to preserve and protect the family, and thus has particular knowledge about the impact of child pornography that will be helpful to the Court in this case.

Help Us Regain the Children (H.U.R.T.), a national legal research center and lobbying entity, has inspired state and federal legislative investigations and hearings on sexual abuse and exploitation of children fought in the family courts and child protective system. Several of the legislative proposals crafted by H.U.R.T. have been accepted into the Committee Views accompanying legislation before the U.S. Senate Labor Committee. Child advocates, legal experts, mental health professionals, and parents of sexually abused children have been brought by our center to the attention of state and federal legislatures for the purpose of building a strong record, detailing the severity of the malfunctioning of our courts and social agencies in their role to protect children from predatory harm.

JuriNet, Inc. is a California-based Internet company providing on-line legal information and services, within the Internet's first legal cyber mall, in a safe and enjoyable environment for legal professionals worldwide. JuriNet Inc.'s purpose is to centralize "electronic legal commerce" and provide the legal vertical market worldwide with "one stop" shopping within the Internet environment. The company intends to establish JuriNet, Inc. as a global industry benchmark for self-regulation and responsibility, ensuring that this legal cyber mall represents a safe and enjoyable place for all legal professionals to work, learn and communicate.

Kidz Online is a non-profit educational organization dedicated to introducing young people from all economic levels to the networking technologies that will play a major role in their futures. We are an on-line service just for kids and provide e-mail, monitored chat rooms, a kids news section, and educational non-violent games, in addition to a menu of technical training

opportunities. All content on Kidz Online is screened for inappropriate and adult material.

Laura Lederer, J.D., is a contributor and editor of *Take Back the Night: Women on Pornography* and *The Price We Pay; the Case Against Racist Speech, Hate Propaganda, and Pornography.*

Log-on Data Corporation is a research and development technology firm located in Southern California. The company is committed to protecting children from illegal pornographic materials on-line and has developed a software filter product to assist caregivers in protecting children.

Legal Pad Enterprises, Inc. is a California-based Internet company providing on-line legal information and services in a safe and enjoyable environment for consumers worldwide. Legal Pad Enterprises first debuted on America Online in 1995 and is now accessed only on the World Wide Web, providing consumers globally with legal information and news. Legal Pad caters to adults and children with age-appropriate content and issues. Legal Pad's children's web site, Legal Pad Jr., provides kids and teens quality "edutainment" in an electronic medium where they can safely express themselves interactively via message boards, chats, and newsletters produced by their peers. Legal Pad Jr. is designed to encourage positive attitudes toward, and active participation in, learning how law affects life today and in the future. Legal Pad's "Partnership with Schools" brings together kids, teens and teachers to facilitate and enhance school outreach programs and teach how to travel and communicate safely in cyberspace. Currently, the company employs a cyberspace form of "Neighborhood Watch" within its site through an alliance with Cyber Angels. Legal Pad's electronic field trips unite kids around the world and teach them about on-line safety and opportunities. Legal Pad intends to introduce the first 911 service on the Internet and establish itself as a global industry benchmark for self-regulation and responsibility, ensuring that the entire site provides a safe and enjoyable place to work, learn, communicate and entertain.

Mothers Against Sexual Abuse (MASA) is a national, non-profit organization dedicated to protecting children against the tragedy of sexual abuse by educating society about child sexual abuse, providing referrals for victims, and initiating new legislation. MASA is also actively involved with establishing a comprehensive, nationwide network of organizations, professionals, and ordinary people concerned about the Nation's children. In addition, MASA has developed a court advocacy program that assists victims and aids judicial reform.

National Association of Evangelicals is a voluntary fellowship of evangelical denominations, churches, schools, organizations and individuals. NAE provides an evangelical identification for 42,500 churches from more than 80 denominations and has a service constituency of approximately 27 million through its commissions, affiliates and subsidiary. Its purpose is to provide a means of cooperation and evangelical witness, and one of its primary concerns is the protection of families from the moral pollution that endangers them.

National Coalition for the Protection of Children and Families (NCPCF) was founded in 1983. It assists concerned citizens and community leaders in efforts to significantly reduce sexual exploitation and violence by (a) increasing public awareness of the harm and availability of exploitative and abusive pornography, particularly in the lives of children; (b) supporting the enactment and enforcement, within the parameters of the Constitution, of limitations on pornography; and (c) offering assistance to people whose lives pornography has harmed. NCPCF programs are carried out nationally and include resource development and distribution (including a wide range of research reports documenting the harms of pornography); victim assistance (including seminars, training counselors, therapists and church pastors to directly help addicts, spouses of addicts and victims and survivors of sex abuse); and assistance and training to law enforcement. NCPCF's work in the field over the last fourteen years provides a depth of experience to contribute to the Court's resolution of this case.

National Council of Catholic Women (NCCW) is a nationwide federation of 8,000 Catholic women's organizations representing millions of Catholic women. NCCW acts through its affiliated organizations to support, empower and educate all Catholic women in spirituality, leadership and service. NCCW programs respond with Gospel values to the needs of the Church and society in the modern world.

National Political Congress of Black Women, Inc. (NPCBW) is a non-partisan, independent political organization which encourages all African American women to participate in the political and economic process as voters, candidates, policy makers, fund-raisers and highly visible role models. NPCBW serves as a catalyst for the election and appointment of African American women to all levels of government and the political process. In addition, NPCBW encourages mentoring and political involvement, offers training in the political process, and advocates public policy positions beneficial to the needs and aspirations of African Americans, at all levels of government.

Omaha for Decency (OFD) is a non-profit organization that educates citizens primarily in the Omaha metropolitan area about the principle that obscenity is not protected speech under the First Amendment, and about the harmful effects of pornography. OFD works with local and state law enforcement agents in cases regarding the illegal distribution of pornography. It is also active in urging citizens to utilize their right to fight pornography through working to improve laws, by asking law officials to enforce laws, and by communicating concerns about the harms of pornography to merchants, the media, and others.

One Voice/The American Coalition for Abuse Awareness is dedicated to improving the quality of life for survivors of sexual abuse and incest, as well as physical and emotional abuse. Located in Washington, D.C., its purpose is to build a comprehensive network of attorneys across the country who are committed to furthering the rights of survivors under the law; to develop educational outreach programs; to facilitate a national grassroots movement to support the

projects in progress on the issues of sexual abuse and incest; and to advocate changes in the statutes of limitations for states. One Voice believes that the connection between childhood abuse and child pornography has been established beyond any doubt and supports the enforcement of laws aimed at preventing the production and distribution of child pornography. The American Coalition for Abuse Awareness (ACAA), a public policy project of One Voice, is a coalition of individuals and groups committed to resolving the issue of child sexual abuse. In addition, the ACAA is committed to the development of public and media awareness of the issue of the sexual abuse of children; the development of educational outreach programs for members of the judicial and legislative branches of government; and establishment of a national body to make policy recommendations on issues regarding childhood sexual abuse, the protection of children, and adult survivors of abuse.

Oklahomans for Children and Families (OCAF) is a non-profit organization founded by George Harper in 1984. It was originally called Oklahomans Against Pornography. With Bob Anderson currently serving as president, OCAF is an alliance of concerned citizens, including civic, business, religious, health care and educational organizations. Its mission is to reduce sexual violence and the victimization of women and children in Oklahoma County and throughout the State of Oklahoma by eliminating child pornography and other illegal pornography and regulating sexually-oriented businesses and sexual materials harmful to minors. OCAF seeks to accomplish this by educating Oklahomans regarding the danger and harm of pornography, by mobilizing concerned citizens to action, by working cooperatively with justice officials to enforce obscenity/child protection laws, and by giving assistance to victims.

Religious Alliance Against Pornography (RAAP). Founded in 1986, RAAP is an inter-faith alliance of religious leaders. Members include senior representatives of the Protestant, Roman Catholic, Eastern Orthodox, Jewish, and Latter-day Saint communities committed to addressing the problems of illegal hard-core and child pornography. RAAP is united in its strong commitment to constitutional freedoms guaranteed by the First

Amendment, just as it is united by its fundamental convictions about human dignity. RAAP opposes government censorship and promotes enforcement of all laws governing illegal pornography. Currently led by Dr. Jerry R. Kirk, and formerly co-led by the late Joseph Cardinal Bernardin, RAAP has worked to encourage enforcement of laws on exploitation, child pornography and illegal obscenity. The Alliance has labored to encourage society to take seriously its responsibility to shield children from pornography and the worst impulses of adults. Most recently, the Alliance held a national summit in Washington, D.C., on the problem of child sexual exploitation. RAAP has made extensive efforts in combating the U.S. role in international child sex tourism. RAAP's efforts have focused on a central principle: encouraging a deeper moral discussion and educating citizens with a heightened awareness of their communal responsibilities as an essential partner to their private rights.

The Salvation Army is concerned that the dignity of mankind should be preserved and deplores the increasing pornography and blasphemy infecting books, magazines and newspapers, and featured in the theater, at the movies, in radio and television, and on the Internet. The Salvation Army maintains its stand against evils that threaten the quality of personal and national character and seeks to arouse public conscience against such evils. The Salvation Army wholeheartedly supports the education of people on matters relating to the sanctity of proper sexual relationships based on the teachings of the New Testament.

Victims' Assistance Legal Organization, Inc. (VALOR) was founded in 1981 as a national non-profit organization dedicated to promoting the rights of victims of crime in the civil and criminal justice systems. With support from foundations, individuals and government grants, VALOR's recent activities include: producing its 1995 and 1996 *National Crime Victims Rights Week Resources Guides*; developing a Model Restitution Reform Project; and providing leadership on reforms in the areas of child abuse, juvenile justices, sentencing, and parole.

Weitzman, Lenore, Ph.D., is a sociologist who studies law and the social effects of legal rules. She is the author of the award-winning book, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America*, three other books and numerous articles. She is currently Professor of Sociology and Law.

WheelGroup Corporation is a leading-edge network security company specializing in intrusion detection and the prevention of unauthorized or illegal activity on computer networks. Although a supporter of First Amendment rights, WheelGroup is adamantly opposed to illegal communications such as child pornography. The company has provided technical advice to Enough is Enough on the matter of the prevention of such activity and is a strong advocate that technologies (such as those it has produced) exist in the commercial market for effectively preventing illegal communications activities.

Supreme Court, U.S.
FILED
JAN 21 1997
CLERK

No. 96-511

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

JANET RENO, ATTORNEY GENERAL
OF THE UNITED STATES, *ET AL.*, *Appellants*

v.

AMERICAN CIVIL LIBERTIES UNION, *ET AL.*, *Appellees*

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

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INTEREST OF *AMICI CURIAE*

Amici Curiae Members of Congress are listed on the cover and are United States Senators and Representatives who voted for and were instrumental in the passage of the law under review, the Communications Decency Act of 1996, and wish to present their unique views on the law to this Court and assist the Court in upholding this important law on its face.

CONSENT TO FILE BRIEF

Consent was granted by all parties for the filing of this Brief of Members of Congress as *Amici Curiae* in Support of Appellants by counsel of record for the Attorney General, the ACLU Plaintiffs, and the American Library Ass'n Plaintiffs.

THE ACT AND THE DECISIONS BELOW

The Communications Decency Act of 1996 ("CDA") was passed by the United States Congress on February 1, 1996, and signed into law by the President on February 8, 1996. This is a facial challenge to the CDA's offenses and defenses for using a telecommunications device or interactive computer service or facility to knowingly send or display indecent material to minor children, 47 U.S.C. §§ 223(a)(1)(B), (a)(2), and 223(d)-(h). The Act also updated, but no challenge was brought against, two obscenity statutes, 18 U.S.C. §§ 1462 and 1465. *See* Communications Decency Act of 1996, Title V of the Telecommunications Act of 1996, Pub. L. No. 104-104 (S. 652), 1996 U.S.C.C.A.N. (110 Stat.) 133-43.

The Conference Report on the CDA is a statement of the intent of Congress. *See Joint Explanatory Statement of the Committee of Conference*, Report for Pub. L. No. 104-104, reprinted at 1996 U.S.C.C.A.N. Leg. Hist. 200-11.

The decision under review is reported as *ACLU, et al. v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996) (June 11, 1996). A related decision is *Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996) (July 29, 1996), appeal stayed, No. 96-595.

SUMMARY OF ARGUMENT

These *amici* submit that this Court should interpret, construe, and declare the indecency sections of the CDA as constitutional, valid, and enforceable. Failure to recognize the power of Congress to extend reasonable protections for minor children to interactive computer services, including the Internet, would result in a serious departure from established law and cause a fundamental reversal in the way in which law and society handle children's access to pornography.

The District Court below misinterpreted the indecency test to be so broad that it could reach virtually any sexual speech, regardless of its specific context, purpose, or intent, and thus made the CDA appear unconstitutional.

Amici ask this Court to properly interpret the CDA as adopting a narrow test for indecency that does not reach serious expression that should be protected for adults, and thereby recognize its constitutionality.

This Court should find that the indecency standard, as tailored to this medium of communication, is a facially valid test for identifying patently offensive representations of sexual and excretory acts and organs that should be restricted from children and would not, in context, restrict legitimate, serious sexual works. Congress adopted a medium specific standard for online indecency and this Court can recognize that the scope of such indecency for the CDA does not restrict materials that are worthy of protection online. Judgments as to specific violations, defenses, compliance methods, or the nature of particular communications are evidentiary, as applied, factual considerations that should be reserved for case-by-case contextual analysis in actual cases or controversies.

The District Court created, in effect, a previously nonexistent license to knowingly send indecent pornography directly to known children and to knowingly display it to minor children on computer networks without taking any good faith steps to restrict it from their access. If allowed to stand, this ruling would force this nation's federal and state legislatures to surrender their compelling interests in protecting children from

pornography, in favor of the economic interests and ideological wishes of computer pornography providers, leaving them unburdened and untroubled even by reasonable responsibilities for their pornography reaching children. This result is being increasingly exacerbated by the uniquely pervasive nature of the medium and the growing accessibility that America's children have to interactive computer networks, both at home and, more often, outside the home and outside parental control. This unique accessibility to children will only increase with the Government's incentives for helping schools provide Internet access to all students, and with libraries providing free, unsupervised Internet access to children of all ages.

Adults should not be granted an absolute First Amendment right to use the Internet to knowingly send or make indecency available to minor children, just as they cannot use billboards or magazine racks to knowingly sell or display pornography to minor children. Indecent material may be protected expression among adults, as this Court has said, but indecent and harmful material is not necessarily protected from restriction when disseminated to children, as this Court has also said.

The focus of this Court should not be on whether adults who wish to show patently offensive sexual or excretory depictions would find it bothersome to restrict them from minors. Instead, this Court must decide whether the provider of such patently offensive material should be relieved of all burden of making any good faith effort to restrict his indecency from children, in light of the compelling interest that government and all of society have in protecting minor children from premature exposure to patently offensive pornography.

Amici suggest that three actions should be taken by the Court in this appeal from the preliminary injunction:

1. Reverse the unprecedented decision below that this Court's test for indecency and patent offensiveness is unconstitutionally vague and overbroad and uphold the CDA as adopting the medium specific, constitutionally valid test of online indecency for telecommunications devices and for the Internet and other interactive computer services.

2. Reverse the decision below that 47 U.S.C. § 223 (a)(1)(B) and (a)(2) are invalid for using the standard of indecency and uphold this section as creating a valid offense of knowingly using a telecommunications device to send indecent messages directly to a known, minor recipient.

3. Reverse the decision below that 47 U.S.C. § 223 (d)(1) and (d)(2) are facially invalid in all respects and make four separate findings: (1) uphold subsection (d)(1)(A) as creating a valid offense of using an interactive computer service to knowingly send online indecency to a specific minor; (2) uphold subsection (d)(1)(B) as creating a valid offense of knowingly displaying online indecency in a manner available to minors on commercial sites or services, without taking good faith steps under available technology to restrict access by minors to such indecency; (3) uphold subsection (d)(1)(B) as creating a facially valid offense as to persons who knowingly display online indecency in a manner available to minors without taking any good faith steps under available technology to restrict access by minors to such indecency; and (4) uphold (d)(2) as creating a valid offense as to interactive computer service owners and operators who knowingly permit the facilities under their control to be used for the known sending of indecent material to specific minors or for the known display of indecency in a manner that is available to minors, without taking any available good faith action to restrict it from minors.

Amici also submit that the record of the preliminary injunction hearing below does not conclusively establish that pornography distributors cannot take reasonably effective steps online to restrict their indecency from children while making it available to adults and was, therefore, incomplete, inaccurate, and misleading. The seriousness of striking down the Act's provisions without complete discovery and full disclosure of facts concerning technically feasible and possible technologies for compliance with the CDA would at least warrant a remand for reconsideration and a rehearing or trial on the merits, rather than an affirmance on this record.

LAW AND ARGUMENT

I. THE CDA'S INDECENCY TEST IS A VALID AND PROPER STANDARD TO SEPARATE PROTECTED SPEECH FROM "ONLINE INDECENCY" THAT IS UNPROTECTED FOR MINOR CHILDREN.

In its Conference Report on the CDA, Congress described the offenses added by the Act to protect minor children from online indecency, *see* Conf. Rep. at 188, 1996 U.S.C.C.A.N. at 201-02:

> New subsection 223(d)(1) applies to content providers who send prohibited material to a specific person or persons under 18 years of age. Its "display" prohibition applies to content providers who post indecent material for online display without taking precautions that shield that material from minors. . . . Defenses to violations of the new sections assure that attention is focused on bad actors and not those who lack knowledge of a violation or whose actions are equivalent to those of common carriers.[1]

The District Court below found the CDA unconstitutional on its face for two main reasons, separately discussed by each of the three judges sitting on the panel. The first was that the test for "indecency" and "patent offensiveness" was unconstitutionally vague and overbroad and would totally ban indecent speech for adults and some speech protected even as

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[1] Note the similarity in the language of Congress to that of this Court in *Mishkin v. New York*, 383 U.S. 502, 510-11 (1966), that "[i]t is not innocent but *calculated purveyance* of filth which is exorcised," in describing the *scienter* requirement of being "aware of the character of the material" as one that "fully meets the demands of the Constitution," a holding repeated in *Hamling v. United States*, 418 U.S. 87, 119-24 (1974) (noting, at 121, the emphasis in the original).

to minors.[2] The second was that the CDA was not a least restrictive means because existing protocols and practices on the Internet, Usenet, and World Wide Web made compliance difficult or impossible for potential providers of indecency.[3]

This Court can address both of these perceived defects by recognizing the test for indecency for interactive computer services and telecommunications devices as a uniquely suited test for online indecency and recognizing the broadly flexible compliance defenses for the various components of the interactive computer media.

Amici recognize that a standard of online indecency for interactive computer services that are available to minors would be more permissive than broadcast indecency and would allow unrestricted availability of anything that can be aired on radio or TV, or lawfully sold or displayed to a minor in a store, on a billboard, on one's jacket in public, or provided to a minor by phone, fax, mail, cable, or in a school, museum, or library.[4] Congress's Conference Report on the CDA demonstrates just

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[2] *See ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996) (two judges finding facial vagueness and all three concluding overbreadth). *But see Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996) (finding statutory overbreadth possible, at 24-26, but not vagueness for indecency, at 20-24).

[3] *See* Findings of Fact and opinions of all three judges below. *See also*: similar findings as to overbreadth by N.Y. court, 930 F. Supp. at 25-34.

[4] *See FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978), *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *Ginsberg v. New York*, 390 U.S. 629, 636, 641 (1968); *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 394-98 (1988), 488 U.S. 905 (1988) (on remand, Va. display law upheld as construed by Va. Sup. Ct., 882 F.2d 125 (4th Cir. 1989)), *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975), *Interstate Circuit v. Dallas*, 390 U.S. 676 (1968), *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); *Cohen v. California*, 403 U.S. 15, 20 (1971); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Hannegan v. Esquire*, 327 U.S. 146 (1946), *Lamont v. Postmaster General*, 381 U.S. 301 (1965), *Bigelow v. Virginia*, 421 U.S. 809 (1975), *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983); and *Board of Education v. Pico*, 457 U.S. 853, 870-72 (1982).

such an expectation[5] and this Court's precedent protects such a level of expression, even to minors, without violating the indecency standard.[6] This is not so for broadcast indecency, which is the broadest test for indecency and covers a wider breadth of sex and nudity because it is designed to protect both minors and unconsenting adults over radio and TV. *See FCC v. Pacifica Foundation*, 438 U.S. 726, 748-50 (1978). The CDA chose the less restrictive measure of only prohibiting the knowing transmission or display of indecent material to minors, not unconsenting adults, so the offense is narrower than under 18 U.S.C. § 1464 and differs markedly from broadcasting law. Unlike for broadcasting, adults are not protected by the CDA even if they inadvertently access online indecency. This Act requires only the protection of minor children.[7]

Online indecency was not intended and should not be held to have the same scope as broadcast indecency and the two standards are not co-extensive. Adults under the CDA need not avoid all the sex and nudity that would be prohibited or restricted to safe harbor hours on radio or TV under the broadcast standard of indecency and its enforcement policies. Adults need only avoid sending to children, or displaying to minors on sites that are available to children, that type of explicit sexual depiction or description that constitutes "online indecency" because its offensiveness is patently clear under the

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[5] Conf. Rep. at 188-89, 190-91, 1996 U.S.C.C.A.N. Leg. Hist. 202-05. *See also* 141 CONG. REC. S.9770-75 (daily ed. July 12, 1995) (statements and letters of original sponsor, Senator James Exon); 141 CONG. REC. S.8328, 8337, 8386, *et seq.* (daily ed. June 14, 1995) (Senate debate and CDA passage, 84-16, by the Exon -Coats Amendment)

[6] *See Denver Area Ed. Tel. Consortium v. FCC*, __ U.S.__, 116 S. Ct. 2374, 2387, 2389-90, 135 L.Ed.2d 888 (1996).

[7] Especially when a law is aimed only at protecting minors, but puts reasonable limitations or responsibilities on adults to protect them from material that would be lawful if kept between adults only, the balance can be struck in favor of children, since the material is not protected as to them. *See Ginsberg v. New York*, 390 U.S. at 636 ("[M]aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children.").

circumstances when considering the host of variables of value, intent, prurience, purpose, audience, subject matter, etc. As such, the type of pornographic indecency that is unlawful to display to minors online encompasses all that would be unlawful to display or sell to minors in all public streets, places, and stores. However, what could lawfully be available to all adults and even children online can include any seriously valuable sexual material that would not be indecent online, even if it could be unlawful to broadcast (if indecent for unconsenting adults and children) or prohibited from display in a commercial store or public place (if harmful to minors). Therefore, the federal standard of "online indecency" is not more restrictive than the state standard of "harmful to minors" and can be less so when considered "in context."[8]

It should be noted that the online indecency standard provides even more latitude to consider serious literary, artistic, political, and scientific value for adults, since it is based on the second prong of the "*Miller*" obscenity test,[9] than would the state "harmful to minors" standard, which is based on a variable standard that considers what is offensive in light of what is suitable for minors and what prurience and value it

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[8] Properly understood, the online indecency standard can clarify much misunderstanding among potential parties wishing to comply with the law. Rep. Rick White, in offering a CDA alternative bill in Conference for the House, chose the harmful to minors test, instead of indecency, thinking it would be a more accepted test in the Internet community, while admitting that the practical result of each test would be the same. *See* Transcript Before the Joint Conferees on S.652, Dec. 6, 1995, p. 25, lines 14-22 (unpublished, but on public file for inspection, in Dirksen Senate Office Building, Room 508) (Rep. White: "We adopt instead of the indecency standard, called for in Mr. Hyde's proposal, we use the standard that has been used in 48 states, known as the harmful-to-minors standard. It accomplishes the same thing, but it provides a lot more certainty so that people who put these sort of materials on the Internet know whether they are going to be subject to liability or not.").

[9] As construed in *Pacifica*, at 750, to require consideration of serious value in appropriate circumstances. Congress recognized the interactive computer media as such a setting, as did this Court with cable TV in *Denver Area*, 116 S. Ct. at 2389-90.

would have only in relation to minors. *See Miller v. California*, 413 U.S. 15, 24-25 (1973); *Ginsberg v. New York*, 390 U.S. 629, 634 (1968).[10]

The court below mistakenly arrived at just the opposite conclusion and found that Congress adopted a more broadly encompassing test with indecency than it would have with harmful to minors.[11] This misinterpretation alone warrants reversal of the District Court's opinion that Congress should have no power to protect children by use of the indecency standard for any regulation of telecommunications devices and interactive computer services.[12]

The court below failed to read the law as this Court required in *Pacifica* and created a hypothetical overbreadth that was unwarranted by the plain words of the statute and

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[10] Another difference between "online indecency" and "harmful to minors" is in the structure of the test and the burden of proof. Since reasonable minds of average adults can agree that a particular treatment of sex or nudity is "patently" offensive, because it exceeds the customary limits of candor in that medium, and is devoid of serious value or purpose or is pandered as prurient pornography, then its "indecency" can be evident for the medium under consideration and in that context. Similarly, material "harmful to minors" would be illegal to provide to minors anywhere off-line. For indecency, patent offensiveness is determined in the context of a "host of variables" and the trier of fact would be instructed that it must consider the presence or absence of value and could consider any evidence of pandering in order to reach its judgment as to whether it was patently offensive under those circumstances. For a state harmful to minors case, all three prongs are found separately and only in relation to minors.

[11] *See* 929 F. Supp. at 855, n. 1 (Sloviter, C.J.), at 859 (Buckwalter, J.), and at 873 n. 16 (Dalzell, J.) (*See also id.* at 882, anticipating the death of *Pacifica* and giving hypothetical "decency" acts by Congress that presumably would be applied to heretofore protected materials. It bears comment that those same materials exist now in harmony with state harmful to minors laws and if they aren't harmful to minors, they could not be indecent to adults.).

[12] As the lower court stated, "Congress may not regulate indecency on the Internet at all." 929 F. Supp. at 877.

made the CDA falsely appear unconstitutional. Faithfulness to *Pacifica* would have avoided such a result.[13]

A faithful application of *Pacifica* and *Denver Area,* recognizing the true capabilities and knowledge of the parties and accepting the true nature of the test, is illustrated in the recent decision of another three-judge court hearing a challenge to certain cable TV provisions in the CDA and finding the harm to children a serious matter warranting Government attention toward the most egregious offenders who are well aware of the type of sexual exploitation materials within the meaning of indecent. *Playboy Entertainment Group, Inc. v. United States*, 945 F. Supp. 772 (D. Del. 1996).

A reasonable understanding of the test for "online indecency" for the Internet and other computer and telecommunications systems, would be to recognize that the CDA's use of the indecency standard is in a specific contextual fashion that is uniquely applicable to these interactive computer services and networks, as Congress intended. In this regard, this Court need not "construe" the statute so as to change it, but only to read it within its constitutional scope, as the Court did in *Pacifica*, and make clear its lawful and intended reach.[14] These *amici* submit that the court below "construed" the law and did change its plain meaning, but did so in a way that improperly expanded its sweep and, by doing so, the District Court created a perceived overbreadth that is beyond the scope of the test mandated in *Pacifica* and intended by Congress to be the standard for the CDA. This Court, therefore, is faced with resolving this conflict and should uphold the law within its proper limits and for its intended and necessary purposes.

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[13] As this Court illustrated a fortnight later in *Denver Area, supra.*

[14] This type of clarifying construction to a federal statute's properly intended scope has a long history for First Amendment sensitive laws. This Court announced *scienter* principles in *Smith v. California*, 361 U.S. 147, 154 (1959), and *Mishkin v. New York*, 383 U.S. 502, 510-11 (1966), and the test for obscenity in *Miller v. California*, 413 U.S. 15, 24-25 (1973), and then clarified that they were incorporated into federal law in *Hamling v. United States*, 418 U.S. 87, at 119-24 and 110-15 (1974).

As mandated in *Pacifica*, 438 U.S. at 750, the use of the indecency standard in any medium is "rested entirely on a nuisance rationale under which context is all-important." This concept of "context" was explicitly incorporated into the CDA by Congress, in recognition of the following holding of the Court in *Pacifica, id.* (emphasis added):

> The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, and the differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant.

The indecency standard, as thus interpreted by this Court and applied by the FCC, "does not by any means reduce adults to hearing only what is fit for children," *id.* at 750 n. 28, since consenting adults can obtain indecent materials at stores and theaters and at times or under circumstances where the dissemination of the offensive material may not be "indecent" or may be channeled to adults or by a safe harbor policy.

Amici submit that Congress made its intent and understanding clear in the "Conference Report on the CDA" by stating that this law was adopting a standard of indecency for online services that was particularly sensitive to the presence of serious value:

> The conferees intend that the term indecency (and the rendition of the definition of that term in new section 502 [§ 223 (d)(1)(B)]) has the same meaning as established in *FCC v. Pacifica Foundation*, . . . and *Sable Communications of California, Inc. v. FCC*, . . . that the indecency standard is . . . specifically limited in its reach so that the term is not unconstitutionally vague. . . . [citing Circuit indecency cases]
>
> The precise contours of the definition of indecency have varied slightly depending on the communications medium to which it has been applied. The essence of the phrase—patently offensive descriptions of sexual and excretory activities—has remained constant, however.

The conferees considered, but rejected, the so-called "harmful to minors" standard. *See Ginsberg v. New York.* . . . The proponents of the "harmful to minors" standard contended that that standard contains an exemption for material with "serious literary, artistic, political, and scientific value," and therefore was the better of the two alternative standards. . . . This assertion misapprehends the indecency standard itself, and disregards the Supreme Court's various rulings on this issue. *See Pacifica* . . . at 743, n. 18, and its progeny.

The gravamen of the indecency concept is "patent offensiveness." Such a determination cannot be made without a consideration of the context of the description or depiction at issue. It is the understanding of the conferees that, as applied, the patent offensiveness inquiry involves two distinct elements: the intention to be patently offensive, and a patently offensive result. . . .[citing FCC rulings] Material with serious redeeming value is quite obviously intended to edify and educate, not to offend. Therefore, it will be imperative to consider the context and the nature of the material in question when determining its "patent offensiveness."

[U]se of the indecency standard poses no significant risk to the free-wheeling and vibrant nature of discourse or to serious, literary, and artistic works that currently can be found on the Internet, and which is expected to continue and grow. As the Supreme Court itself noted when upholding the constitutionality of indecency prohibitions, prohibiting indecency merely focuses speakers to re-cast their message into less offensive terms, but does not prohibit or disfavor the essential meaning of the communication. . . . Likewise, requiring that access restrictions be imposed to protect minors from exposure to indecent material does not prohibit or disfavor the essential meaning of the indecent communication, it merely puts it in its appropriate place: away from children.
[Conf. Rep. at 188-89, 1996 U.S.C.C.A.N. Leg. Hist. at 202-03, Citations omitted.]

The enactment of the CDA with the federal indecency standard was not, therefore, a rejection of the serious value prong of the "harmful to minors" test. Congress adopted an even less restrictive test with indecency, since only a lack of serious value for minors is relevant to the state standard whereas indecency considers serious value for adults as well as minors. The presence of truly serious value or purpose is a significant factor in a finding that a presentation does not offend or was not intended to offend. Conversely, that which is "pandered" for its prurience could be found not to be offered for a serious purpose or for any serious value. [15]

Under the "online indecency" test, the Government need not affirmatively prove the presence of prurience or lack of serious value. However, the trier of fact must nevertheless consider the presence of value and, in addition, may consider any evidence of pandering to prurient interests in determining the patent offensiveness of the material in the specific factual context of the "host of variables" that are inherent in the legal "term of art" the law calls "indecency."[16]

Therefore, this Court can recognize that online indecency is a medium specific standard for the CDA and is a proper synthesis of the "host of variables" in a nuisance rationale, as required by *Pacifica* and *Denver Area*, such as the following:

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[15] Evidence of pandering to prurience can distinguish obscene, patently offensive, pornography from serious, protected works. *See Ginzburg v. United States*, 383 U.S. 463, 466-67, 471-74 (1966), *Hamling v. United States*, 418 U.S. 87, 127-29 (1974), *Splawn v. California*, 431 U.S. 595, 598 (1977), *Pinkus v. United States*, 436 U.S. 293, 303-04 (1977).

[16] Judge Dalzell below, 929 F. Supp. at 865-66, noted the reference in *Sable* at 132, that "Pornography is normally either obscene or indecent," and noted on his own "obscenity (commonly understood to include so-called hardcore pornography)" and that he uses the word pornography to refer to the type of sexually explicit, "adult" material similar to that at issue in *Sable*. The term does have a common usage and universal meaning that comports with the character of obscenity and indecency. *See also* Bruce Taylor, *Hard-Core Pornography: A Proposal For A Per Se Rule*, 21 U. MICH. J.L. REF. 255 (1988).

"Online indecency" means any communication that, "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs". Any determination of patent offensiveness must consider the presence, lack, or inherent involvement of the following host of variables: any serious literary, artistic, political, or scientific value inherent in the material itself; any serious literary, artistic, political, or scientific purpose to which the material was intended or used by the communicator; the time, place, and manner of the communication; the content, theme, and context of the material in relation to its subject matter, program, forum, and manner of presentation; the composition and age of the audience; the pervasiveness of the medium used and its availability to minor children under the circumstances; any evidence of intention to be patently offensive; and any evidence of pandering or exploiting a prurient interest in nudity, sex, or excretion in the creation, marketing, or dissemination of the material.

As used, the CDA's indecency test for online computer services need not make each variable a separate element, but clarifies that it is the totality of the circumstances that shall be considered in making the ultimate determination of whether the communication was "patently offensive" in the context in which it was made, disseminated, and received.[17] One need not pre-judge its application in every future or hypothetical circumstance to know that the fairness of the result will be governed by the mandate that each future judgment be guided by constitutional principles, such as "beyond reasonable doubt"

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[17] Indeed, Judge Buckwalter below mentions several of the variables required for consideration "in context" of patent offensiveness, 929 F. Supp. at 864, but fails to incorporate them into the test for "indecency," even though he recognized that the standard could be so construed, *id.* at 861-62 ("Therefore, I will acknowledge that the term indecency is 'reasonably susceptible' to the definition offered in the Conference Report and might therefore adopt such a narrowing construction if it would thereby preserve the constitutionality of the statute.").

and "presumption of innocence", or an objective rule such as the "reasonable man" of fact finding.[18]

Such a judicial melding of the generic definition with its constitutional considerations is faithfully consistent with this Court's development of the tests for obscenity, child pornography, harmful to minors, and indecency, and with the intent of Congress as expressed in the CDA and its accompanying Conference Report. This would accomplish the same sensitivity to First Amendment values and allow this test to be used, like that for obscenity and harmful to minors, as a constitutionally valid method of separating protected speech, that may be freely and openly distributed to everyone online, from patently offensive sexual and excretory depictions that are indecent in the online context and clearly inappropriate for knowing transmissions or displays to minor children.

This is the mandate of *Pacifica*. As the Conference Report explains, it is also the affirmatively expressed intent of Congress in adopting the indecency test of *Pacifica* for the computer medium. In determining whether material is patently offensive in the context of interactive computer services, and therefore meets the test for online indecency, courts and triers of fact must consider its offensiveness in the context of the host of variables mandated by this Court in *Pacifica* and *Denver Area*, including the presence of serious value or purpose and, if evident, any pandering to prurient interests.[19] As such, the CDA would not reach legitimate and serious

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[18] As stated in *Miller v. California, supra*, 413 U.S. at 26 n. 9: "The mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged." As also observed in *Roth v. United States*, 354 U.S. 476, at 492 n 30 (1957), 'it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system.'"

[19] Prurient appeal may not be "an essential component of indecent language," as stated in *Pacifica*, at 741, but evidence of pandering to prurience can negate a false claim of serious value or purpose. *See Ginzburg v. United States*, 383 U.S. 463, 465-76 (1966); *Hamling, supra*, 418 U.S. at 130; *Splawn v. California*, 431 U.S. 595, 597-98 (1977).

sexual information that should be protected, as the Government properly represented below.[20]

The CDA is *not* a total ban on indecency, and should not be interpreted to have the same effect as a ban.[21] In contrast, the CDA criminalizes the knowing transmission of indecent material to a specific minor child and the knowing display of indecent material to minors. The offenses in this Act require an offender to act "knowingly" by knowing of the sexually explicit character of the communication and knowing that it is going to or is available to minors. This dual *scienter* element further narrows the reach and scope of the law, since it prevents totally innocent or mistaken transmissions to minors, even if indecent. *Ginsberg v. New York*, 390 U.S. 629, 644 (1968); *Hamling v. United States*, 418 U.S. 87, 119-24 (1974); *Osborne v. Ohio*, 495 U.S. 103, 113 n.9, 115 (1990); *U.S. v. X-Citement Video, Inc.*, __ U.S. __, 115 S. Ct. 464, 130 L.Ed.2d 372 (1994).

II. THE CDA'S RESTRICTIONS ON PROVIDING INDECENCY TO MINORS ARE COMPELLED BY THE NEED TO PROTECT CHILDREN.

The CDA is carefully tailored to do no more than is necessary to further the compelling interest in protecting children from accessing online indecency.

Sexually explicit images are undeniably present and available online, and pornographic repositories tend to be heavily accessed making it more freely available over the Internet than in other mass communications media in the

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20 929 F. Supp. at 857, 863, 870-71.

21 The CDA is not like the indecent dial-a-porn statute that was before the Court in *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989). There, the total ban version of prior § 223 (b) was incapable of any narrowing construction, since Congress plainly criminalized the distribution of indecent material to consenting adults.

United States.[22] "Until the CDA, the only barrier to viewing free pornographic images on the Web was often a mouse click affirming that the viewer is of requisite age." *Id.*

This Court's precedent is unmistakably clear that the Government does have a compelling interest in protecting children from pornography. This Court articulated such an interest in *Ginsberg v. New York*, 390 U.S. at 636-43; *Pacifica*, 438 U.S. at 748-50; *Sable*, 492 U.S. at 128; *Denver Area*, 116 S. Ct. at 2391,[23] and has consistently reaffirmed it, most recently in *Denver Area*, 116 S. Ct. 2374, 2391 (1996).[24]

The court below concluded that it is "highly unlikely" that a young child will "come across" pornographic material while surfing the Web, and regarded as significant the notion that "the receipt of information requires a series of affirmative steps." 929 F. Supp. at 852. The extent to which children will affirmatively search for or inadvertently observe sexually explicit pictures on their computer screens is completely irrelevant to the issues in this case, since the compelling interest in protecting them from seeing such material remains the same in either event. *Id.* at 883.

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22 Anthony L. Clapes, *The Wages of Sin: Pornography and Internet Pornographers*, 13 No. 7 Computer Law. 1, 2 (1996).

23 Conversely, the court below did not find Internet pornography to be a serious threat to children. One judge contrasted the case to others "where the potential harm to the children was evident." 929 F. Supp. at 852. Comparing the CDA to a cure "worse than the disease," another was "hard-pressed even to identify the disease." 929 F. Supp. at 881.

24 "We agree with the Government that protection of children is a 'compelling interest.'" *Denver Area*, 116 S. Ct. at 2391. *See Pacifica*, 438 U.S. 749; *Sable*, 492 U.S. 127 ("It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling. . . . This interest extends to shielding minors from the influence of literature that is not obscene by adult standards."); *New York v. Ferber*, 458 U.S. 747 (1982).

The District Court also emphasized that "a child requires some sophistication and some ability to read to retrieve material." 929 F. Supp. at 845.[25]

These conclusions reveal the lower court's lack of recognition of the ease with which children can maneuver today's computers, especially in the point-and-click icon format of the World Wide Web which demands neither computer nor English literacy.[26]

> [I]t is relatively simple for persons of any age and modest experience with the Internet to set up their computers so that reaching repositories of pornography is as simple as selecting a TV channel.[27]

The interactive nature of this new medium, if anything, deepens the Government's interest in protecting children from access to or receipt of online pornography. That is why Congress passed the CDA.

A review of the Telecommunications Act as a whole reveals Congress's intent to expand the development of the Internet, through various means including financial incentives and discounts for schools to provide Internet access to all of American's children.[28] The goal of stimulating the growth and use of the Internet for all, including children, requires a concomitant responsibility to take steps to make the Internet

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25 Humorist Dave Barry's description of the Internet as a worldwide network of university, government, business, and private computer systems run by a 13-year-old named Jason draws a smile precisely because we acknowledge the computer literacy of children.

26 Many pornographic sites, newsgroups, and sexually oriented advertisements have sexual titles, teasers, or labels that are obviously designed to attract men. These sexual ads, titles, and index references are also an attraction to children, whose natural curiosity and immature reasoning often lure them to that which is harmful, rather than repel them from that which their parents and society knows is harmful to them. The ease with which Web browsers will find and deliver pornographic material increases their availability and consumption by the children sought to be protected by the CDA.

27 Clapes, *supra* at 2.

28 *See* the universal service provisions in Sect. 254 of the Act.

safely available to them.[29] If pornography is allowed to proliferate and is freely available to minor children, then there will be a disincentive to universal access and use of the Internet at home and in schools and libraries.[30] Therefore, Congress considered protecting children a necessary part of its interest in facilitating the growth of this important educational and social medium.[31]

III. CONGRESS CHOSE THE LEAST RESTRICTIVE MEANS OF PROTECTING CHILDREN FROM ONLINE PORNOGRAPHY.

Congress enacted the CDA because it was the least restrictive, yet effective, means of promoting its interest in protecting children from access to and receipt of patently offensive sexual and excretory depictions online.[32]

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29 The Court below also ignored that one of the goals of the Telecommunications Act was to facilitate the convergence of telecommunications resources and products. The upcoming convergence of media will present further difficulties for those who would argue that the Internet and other interactive computer systems should be exempt from the reasonable pornography regulations applied to other media.

30 *But see* Rebecca Vesely, *Library Blocks Porn, and May Block Rights*, Wired News, Jan. 7, 1997 (http://www.wired.com/com/news/story/1289.html) discussing the threatened suit by the ACLU against a Florida library which installed blocking software after users accessed pornography and left the screens in plain view of other patrons, and the American Library Association policy of discouraging libraries from using such blocking software.

31 *See* Conf. Rep. at 191, 1996 U.S.C.C.A.N. Leg Hist. at 204-05.

32 *Amici* submit that the Court should use a balancing of interests analysis, as in *Denver Area*, rather than the strict scrutiny test for an absolute ban of indecency to adults that was rejected in *Sable*, 492 U.S. at 126, 131. The CDA, however, would survive a challenge under either test. In *Denver Area*, a plurality of the Court described the suitability of the balance-of-interests test to regulations on evolving technologies: [N]o definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard, good for now and for all future media and purposes . . . we believe it unwise and

The court below recited in its Findings of certain assertions about the nature of the Internet and conclusions that the CDA would criminalize all sexual speech, that compliance is "technologically impossible" and "economically prohibitive" and therefore not a least restrictive means, 929 F. Supp. at 854, and that the CDA will not prevent children from getting pornography and therefore it fails for underbreadth. The court held that its Findings "lead to the conclusion that Congress may not regulate indecency on the Internet at all." 929 F. Supp. at 877 (emphasis added).

This Court's precedent is to the contrary: "[O]ur cases have not left Congress or the States powerless to address the most serious problems." *Denver Area*, 116 S. Ct. at 2384. The First Amendment is committed to protecting most speech from regulation,

> but without imposing judicial formulae so rigid that they become a straightjacket that disables Government from responding to serious problems. This Court, in different contexts, has consistently held that the Government may directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech.

Denver Area, 116 S. Ct. at 2385.

The decision below renders the Government helpless to do anything but hope that parents will purchase and install blocking software in the family computer, and concludes that this is all that is *necessary* to protect children from online indecency.[33] To the contrary, Congress has a compelling

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unnecessary definitively to pick one analogy or one specific set of words now." *Denver Area*, 116 S. Ct. at 2385. "[T]he First Amendment embodies an overarching commitment to protect speech from Government regulation through close judicial [rather than strict] scrutiny" to avoid "imposing judicial formulae so rigid that they become a straightjacket that disables Government from responding to serious problems." *Id.* at 2384.

[33] Contrast this finding with that of the District Court in New York that "blocking software is not widely used" and that there is "evidence that households do not tend to use existing parental control software" (in discussing the lack of defenses made available to the users by the Internet industry). 930 F. Supp. at 947-48.

interest to affirmatively protect children so that they may participate in this new and extraordinary medium, especially where private actors fail to use even the blocking and screening methods at their disposal to protect children from the domestic and foreign pornography that is available online.[34]

Inherent in a least restrictive means analysis is the expectation that the "means" are actions constitutionally taken by Congress, not by private actors. They are legislative in nature, and therefore mandatory—never voluntary.[35] Hypothetical, ad-hoc ways for private individuals to address the problems in which Government has a compelling interest are inapposite to the means by which Government may attempt to promote its compelling interest. [36] "[P]arents and others . . .

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[34] Moreover, if the Government were to do nothing to prevent children's access to online pornography, this abandonment would itself contribute to the harm about which the Government has a compelling interest. In *Ginsberg*, 390 U.S. at 643, the Supreme Court quoted Dr. Gaylin of Columbia University Psychoanalytic Clinic on the harmful impact of sexually explicit material on minors, wherein he emphasized that the harm to children *from being permitted* to view pornography was conceivably "as potentially destructive" as the actual viewing of it. "The child is protected in his reading of pornography by the knowledge that it is pornography, i.e. disapproved." *Id.* "To openly permit implies parental approval and even suggests seductive encouragement. If this is so of parental approval, it is equally so of societal approval—another potent influence on the developing ego." *Id.* In *Ginsberg*, therefore, the Court understood that an essential part of the Government's furthering its compelling interest in protecting children from exposure to pornography is the "official" societal disapproval manifested through laws not only against children consuming pornography, but especially against adults providing it to them.

[35] Just as arguing that "protecting children from indecency only at the caprice of the cable operator is not compelling," *Denver Area*, 116 S. Ct. at 2416, neither is the Government's interest in protecting children from indecency only by the ad-hoc, voluntary actions of some private actors.

[36] The law does not require child safety to be left entirely to the hope or trust that "someone" will protect children from harm. *Pacifica*, 438 U.S. at 744 n. 19: "We are assured by Pacifica that the free play of market

who have th[e] primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." *Dial Information Services v. Thornburgh*, 938 F.2d 1535, 1541 (2nd Cir. 1991), *cert. denied* 502 U.S. 1072 (1992). *See also Information Providers' Coalition v. FCC*, 928 F.2d 866 (9th Cir. 1991).

It stretches the limits of logic and legal precedent to suggest that the Government may take steps to fulfill its compelling interest in protecting children from pornography in every medium, including print, video, television, radio, and the private telephone, but the Government may do *nothing* to further its compelling interest where pornography reaches children by online computers, faxes, videophones, and other interactive computer services and telecommunication devices. Further, it has the untenable and intolerable result that even direct, knowing transmissions of pornography to a known child must be tolerated because "the Government may not, through the CDA, interrupt that [world-wide Internet] conversation." 929 F. Supp. at 883. Absent from the opinion below is any discussion acknowledging that it is fundamentally wrong for adults to knowingly give pornography to children.

As a matter of law, Congress has an independent interest in protecting children from exposure to or receipt of patently offensive sexual or excretory depictions, and is not required and should not be compelled to rely on the private, voluntary actions of others, such as parents,[37] but can encourage their assistance.

Plaintiffs below proffered parental screening software products as a less restrictive alternative to the CDA. Even if they were relevant, however, such actions are not effective,[38]

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forces will discourage indecent programming. . . . [T]he prosperity of those who traffic in pornographic literature and films would appear to justify skepticism."

[37] *Dial Information Services*, 938 F.2d at 1542.

[38] Computer industry reviewers have found that filename-based Cybersitter does not block cryptic titles, word-based Net Nanny does not block pornographic images, and SurfWatch does not work on non-Internet

and therefore do not constitute a less restrictive but "as effective" alternative to the CDA.[39]

Although all parents, schools, and libraries may and should make use of whatever software products are available (*i.e.* X-Stop, Library Safe, Cyber Patrol, Rated-PG) to gain whatever benefits that they can offer, not all parents will purchase such software, and, even if they do, children have access to many computers which will not employ software filtering devices such as in schools, libraries, and neighbors homes.[40]

That the CDA rests the burden of compliance upon the speaker of patently offensive sexual or excretory depictions and not on the consumer of these depictions, including children, not only carries the weight of unanimous precedent, but also has the benefit of being highly practical.[41] Law and logic compel the conclusion that, as between speaker and consumer, the speaker is in the better position to know the content of his speech. Plaintiffs would transfer the obligation from those who are in the best position to know whether something is a patently offensive sexual or excretory depiction

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sources, such as BBSs. *See PC Magazine*, Nov. 7, 1995. It is worth noting that one of the Plaintiffs automatically provides screening for sexual sites when initially subscribing, Microsoft Network (MSN), and then allows an adult credit card holder to disable any or all of the screening levels. The other Plaintiffs who are ISPs or online service access providers place no restrictions on the pornography the children subscribers can access but merely make such software "available."

[39] In *Dial Information Services*, 938 F. 2d at 541, the court found that "in order for appellees to prevail, it must be determined that there are other approaches less restrictive than the Helms Amendment but *just as effective* in achieving its goal of denying access by minors to indecent dial-a-porn messages." (Emphasis added.)

[40] Moreover, many children are capable of out-maneuvering such technology, and the proficiency with which pornographers evade prohibitions to their conduct will be further improved by new means of technological deception, especially if untempered by any legal restraint.

[41] The court in *Dial Information Services*, *supra*, upheld the requirement that the "speaker" of indecent telephone speech bear the burden of keeping his speech away from children, despite the existence of commercially available blocking devices for the home.

to the consumers, who must search, find, identify, and then attempt to block the hundreds of thousands of available pornographic images from their children.

Steps like parental involvement in their children's use of the Internet, the installation of filtering software, and content-rating protocols are each important elements in protecting children on the Internet. These self-help measures should be regarded as complements to the CDA, much as the parental admonition, "don't talk to strangers" complements laws against kidnapping. None of them, however, individually or in the aggregate, eliminates the need for legal prohibition of sending or displaying pornography to children, or supplants Congress's constitutional authority to take action in furtherance of its compelling interest.

IV. COMPLIANCE WITH THE CDA IS FEASIBLE AND NOT TECHNOLOGICALLY IMPOSSIBLE.

The flexibility and capability of Internet technology makes few, if any, desired goals impossible to attain. The CDA restrictions and defenses were designed with this flexibility and potential for creativity in mind.

Under the challenged sections of the CDA, it is not a crime for adults to provide online indecency to other adults, consenting or not. Furthermore, even if a child does obtain patently offensive sexual or excretory depictions, it is a defense to criminal or civil liability, under § 223 (e)(5) and (f)(1), that the provider of the depictions took good faith actions under available technology to limit such depictions to adults. Such good faith actions are an essential aspect of this law, both legally and technologically. The CDA is a technology flexible statute that allows pornography providers to take actions with the means now available, but expects that more will be done when more can fairly be done.[42]

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[42] The sponsors of the CDA and the Conferees purposefully sought this type of interpretation by defining good faith defenses as "any method which is feasible under available technology" in § 223(e)(5)(A), and

The defenses provided in the CDA are both all inclusive of true good faith efforts and allow for more defenses than are available under any other federal indecency law, including broadcasting, cablecasting, or dial-a-porn. The CDA not only incorporates the defenses applicable to the dial-a-porn offenses in § 223 (b) and (c), which were promulgated by the FCC and specifically referred to with approval by this Court in *Sable*, but also provides good faith defenses to those who take steps of their own device or pursuant to any future FCC regulation in order to protect children from accessing their patently offensive sexual or excretory depictions. The CDA's criminal and civil immunities for good faith and "Good Samaritan" acts are available to those who take affirmative steps to restrict indecency from minors, not for taking no action.

The court below granted the injunction against the CDA in part because it concluded that compliance is "either technologically impossible or economically prohibitive for most plaintiffs."[43] The lower court overestimated the difficulties of compliance with the CDA and underestimated the capabilities of interactive computer technology. One of the ways in which the court below distorted the problem of compliance was in its misconstruction of the indecency standard to include communications related in any way to sexuality, which, as stated above, is a patent misapprehension of the constitutional parameters of indecency and the stated intent of Congress. And to proceed, as the lower court did, from the observation that the "the strength of the Internet is [its] chaos" is to misunderstand the true systematic orderliness of the Internet.

It is certainly difficult to relate the observation that compliance is "either technologically impossible or economically prohibitive" to the prohibitions of subsection 223(a)(1)(B) and (d)(1)(A) against knowingly sending indecent material directly to a known child. *Amici* submit that, in light

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providing in § 223(e)(6) for FCC assistance in helping industry and users define, develop, and protect themselves with new defenses. *See also* Conf. Report 1996 U.S.C.C.A.N. Leg. Hist. at 204.

[43] 929 F. Supp. at 854.

of the scienter element, there is no legal or logical reason for finding these direct transmission crimes facially unconstitutional. This Court's precedent, from *Ginsberg* to *Pacifica* to *Sable,* is unequivocally clear about the constitutionality of such a prohibition.

In addition, Judge Sloviter concluded below that it would be a "burden . . . impossible to sustain" (929 F. Supp. at 856) for people online to review their content for patently offensive sexual or excretory depictions. Such a conclusion, if accepted here, would seem to render infeasible *any* Internet regulation, and certainly other pornography-related prohibitions to which Plaintiffs have made no challenge. Internet content and access providers are no more or less able to evaluate their material pursuant to obscenity and child pornography laws which apply online than they would be pursuant to the CDA.

> Since content and service providers must provide solutions to the problem of obscenity and child pornography and since those solutions are likely to be equally effective in regulating indecent or patently offensive expression as well, the technological impossibility argument is not necessarily a persuasive argument, either factually or legally.[44]

That reasonable methods of compliance are technologically feasible is further demonstrated by the fact that many sites are now screening children from access to pornographic materials. There will undoubtedly be more ways to comply in the future, especially when the market is encouraged by the presence of a legal obligation.[45] While evolving technologies are increasing and improving the means of restricting pornography from children, and the FCC can lend its expertise in defining further good faith defense measures

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[44] Clapes, *supra,* at 8.

[45] Curiously, while the court below gave great weight to the possibility that "a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material *will soon* be widely available," the prospect of future developments in age-verification was considered irrelevant. 929 F. Supp. at 842. (Emphasis added).

pursuant to subsection 223 (e)(6), it should not be a matter for dispute that there are sufficient and adequate means already available under present technology for adults to keep their patently offensive sexual or excretory depictions from minors.

The act does not require the impossible, but only requires reasonable, effective, and appropriate actions to prevent children's access to or receipt of pornography. The lower court overlooked a variety of "no tech" and "low tech" means to comply with the CDA as simple as knowing who you are communicating with, channeling indecent communications to "adults only" areas, and utilizing contractual obligations between subscribers and access providers for monitoring.

Other potential means of compliance include system-wide protocols for screening children's access, server-level filtering software, mechanisms which allow content providers to identify adult visitors to their sites, pages, or GIFs, and digital IDs for adults or minors that could provide an age to visited sites, age-tagging programs or protocols, such as the successful "-L18" program illustrated in the hearing below, or an adaptation of the next generation's Internet Protocol for address and routing packets ("IPv6") to code for age in its expanded header extensions for authentication and privacy capabilities,[46] a modification of the existing "finger" program for requesting visitor identification which could be relayed back to the visitor's Internet Service Provider ("ISP") for a reply that the subscriber is of a certain age without giving a name (thus preserving anonymity protections for children).

Although not added to the Findings, it was admitted in the opinion below that sites on the World Wide Web have the present capacity to use "cgi scripts" to exclude minors from accessing pornography. 929 F. Supp. at 854. This situation is likewise with the Usenet, where much of the most graphic and notorious pornography is made available, both hard- and soft-

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[46] *See* "Internet Protocol, Version 6 Specification," RFC 1883, Network Working Group, Deering & Hinden, Dec. 1995, p. 2, 5, 7 (http://ds0.internic.net/rfc/rfc1883.txt); *Byte*, Sept. 1996, "The New and Improved Internet Protocol" (describing new, 128 bit length to replace 32)

core, normal and perverted, actual and simulated. The Findings below describe the Usenet as an open and uncontrolled medium, yet each Internet service or access provider must choose which Usenet feeds to accept. The Plaintiffs did not disclose, and the court failed to find, that the Usenet is actually a privately owned, proprietary, commercial subscription service with closed access and control over each newsgroup, moderated or not, by an administrator. If an ISP does not subscribe to a particular hierarchy or newsgroup feed, it cannot be accessed by customers through that ISP, who would read the groups from the ISP's local server rather than from some remote server or Usenet backbone server somewhere else.[47] The Usenet is totally within the control of the ISP, who could be subject to prosecution for obscenity, child pornography, stalking, and even providing known access to minors, since this is not a "common carrier" service and not within the exemption of § 223 (e)(1).[48]

Moreover commercial online services must decide which commercial services to subscribe to, such as encyclopedias, news, financial data services, Usenet hierarchies, or other special interests. Many commercial Bulletin Board Services do the same and either use the Internet to advertise their BBS telephone number or contract to have their board's content offered by a commercial online content or access provider. Such contractual arrangements are obviously and legally subject to control and existing technology could be used to screen for minors on any such subscription services that would contain pornography.

This Court in *Sable, supra*, 492 U.S. at 126-27, recognized the constitutionality of compliance by making private arrangements with third parties.

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47 See the following archive documents for Usenet ownership, control, protocol, and descriptions: "creating newsgroups," "info-center-faq," "posting-rules," "site-setup," "social-newsgroups," "what-is" (accessible from: http://rtfm.mit.edu/pub/usenet-by-hierarchy/news/answers/usenet/).

48 *See also OCAF White Paper on Internet Pornography* (posted on the Internet on Feb. 2, 1996, at: noporn@mailback.com).

> Whether *Sable* chooses to hire operators to determine the source of the calls or engages with the telephone company to arrange for the screening and blocking of our-of-area calls or finds another means for providing messages compatible with community standards is a decision for the message provider to make.

The commercial, educational, institutional, and corporate online service providers, in addition to acting as ISPs and providing access to the Internet and World Wide Web, can and often do, offer other material over which they have absolute editorial control (such as services, boards, chat rooms, and pages). A service provider must also exercise conscious and deliberate subscription control over which commercial or privately owned services it will take onto its own servers in order to re-offer it to its customers or users.

In all of these instances, every Internet service and access provider can use available server-level screening software to protect the children on their computer systems from pornography. Though the first generation end-user programs were unreliable, as the "online demonstration" in the hearing which failed below illustrates, the next generation server-based applications offer better protection, and ISPs should employ software for minors on their systems, and leave it to parents to unblock if any parent so chooses.

Some members of the industry may consider solving the problem to be against their economic interests.[49] Whether the defenses are economically unpleasant is not dispositive for First Amendment analysis. The Court in *Sable, supra*, 492 U.S. at 126-27, made it clear that compliance costs for the providers of patently offensive sexual or excretory depictions do not affect the constitutionality of the statute:

> While Sable may be forced to incur some costs in developing and implementing a system for screening the locale of incoming calls, there is no constitutional

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49 As a practical matter, whoever offers technical means for automated, safe Internet access for the millions of children in the U.S. and around the world would likely be able to make millions of dollars.

impediment to enacting a law which may impose such costs on a medium electing to provide these messages.[50]

While those who provide patently offensive sexual or excretory depictions may well incur some costs in order to attempt to screen their depictions from children, the cost to children of their failure to do so is incalculable.

In light of the possibilities for complying with the CDA's limited requirements, the assertion of impossibility may portend simply an unwillingness to undertake the effort.

CONCLUSION

Each time pornographers break through a new barrier, society's best reaction should be the honorable one—to protect the children first. As one of the CDA's original sponsors said on the day this law was enacted by the Congress:

> *Sometimes our technology races beyond our reflection, and we are left with a dangerous gap—a period when society is unprepared to deal with the far-reaching results of rapid change. That is the situation we have on the Internet. This is the situation which [the CDA] will address.*[51]

Respectfully submitted,

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MEMBERS OF CONGRESS

January 21, 1997

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50 The Court of Appeals for the Ninth Circuit recently held that decreased profits and costs of market participation are not adequate grounds for a First Amendment challenge in *Spokane Arcade, Inc. v. City of Spokane*, 75 F.3d 663, 96 (9th Cir. 1996).

51 Remarks of Senator Dan Coats, 142 Cong. Rec. S.707 (daily ed. Feb. 1, 1996).

Supreme Court, U.S.
FILED
FEB 19 1997
CLERK

(12)

No. 96-511

In the Supreme Court of the United States

OCTOBER TERM, 1996

JANET RENO, ATTORNEY GENERAL
OF THE UNITED STATES, *ET AL.*,
Appellants,

v.

AMERICAN CIVIL LIBERTIES UNION, *ET AL.*,
Appellees.

On Appeal from the United States District Court for the
Eastern District of Pennsylvania

BRIEF OF *AMICI CURIAE* AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *ET AL.* IN SUPPORT OF APPELLEES

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57 pp

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LIST OF AMICI CURIAE:

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, AUTHORS GUILD, CALIFORNIA MUSEUM OF PHOTOGRAPHY/UNIVERSITY OF CALIFORNIA AT RIVERSIDE, COALITION FOR POSITIVE SEXUALITY, CREATIVE COALITION OF ARTISTS, TRI DANG DO, FEMINISTS FOR FREE EXPRESSION, MARGARITA LACABE, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., MAGGIE LANOUE, LOD COMMUNICATIONS, PETER LUDLOW, CHUCK MORE, PEN AMERICAN CENTER, PHILADELPHIA MAGAZINE, PSINET, INC., ERIC S. RAYMOND, DON RITTNER, THE SEXUALITY INFORMATION AND EDUCATION COUNCIL OF THE UNITED STATES, LLOYD K. STIRES, PETER J. SWANSON, KIRSTI THOMAS, WEB COMMUNICATIONS, AND MIRYAM EHRLICH WILLIAMSON

ALL PARTIES CONSENT TO THE FILING OF THIS AMICUS BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1996
NO. 96-511

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, *ET AL.*,
Appellants,

v.

AMERICAN CIVIL LIBERTIES UNION, *ET AL.*,
Appellees.

BRIEF OF *AMICI CURIAE* AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *ET AL.* IN SUPPORT OF APPELLEES

The decision below correctly held that provisions of the Communications Decency Act of 1996 ("CDA"), 47 U.S.C. § 223(a) & (d), as amended,[1] that criminalize "indecent" and "patently offensive" speech on the international computer network known as the Internet impermissibly infringe rights of communication under the First Amendment and must be enjoined from enforcement. If not enjoined, the statute will deprive both adults and minors of information that is essential to their health and well-being. The statute is unconstitutionally overbroad in criminalizing non-obscene speech that has any connection with sexual topics, despite the fact that the speech possesses serious literary, artistic, political, or scientific value and is protected by the First and Fifth Amendments.

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1. The CDA is Title V of the Telecommunications Act of 1996, Pub. L. No. 104-104, §§ 501 *et. seq.*, 110 Stat. 56, 133-43. Section 502 of the statute, 110 Stat. at 133-36, enacted the operative provisions here as amendments to Section 223 of the Communications Act of 1934, 47 U.S.C. § 223. Citations in this brief are to the provisions as codified in the Communications Act.

STATEMENT OF INTEREST OF AMICI CURIAE

Amici are a diverse group of 25 individuals and organizations that use the Internet, and include Internet service providers ("ISPs"), over whose lines speech targeted by the CDA is carried; individuals and organizations who place on the Internet speech and other forms of expression on wide-ranging subjects; individuals and organizations that access the Internet to receive speech on diverse topics; and others who require and believe firmly in freedom of expression in connection with their use of the Internet. Many are individuals for whom the Internet provides an unprecedented opportunity to publish and disseminate speech on issues that they consider important. Some are educators who use the Internet for both teaching and research. A complete list of *amici*, with descriptions of their use of the Internet, their interest in this litigation, and the impact that the CDA has had (and would continue to have if enforced) on their varying uses of the Internet, is set forth in a more detailed Statement of Interest of *Amici Curiae* that is appended to this brief. All parties have consented to the filing of this brief, and letters of consent are being lodged with the Clerk.

Amici have the unique ability in this litigation to illustrate one of the fatal flaws in the CDA: its broad sweep that is the antithesis of a narrowly tailored infringement on protected speech. As users of the Internet, *amici* are directly affected by the deterrence of speech that the CDA's overbreadth causes. In some cases, *amici* are deterred themselves from engaging in speech because of fear of prosecution under the statute. In other cases, *amici* are deprived of important information because the statute's deterrent effect causes others to make information unavailable. In either event, the CDA impermissibly infringes *amici*'s rights of communication.

SUMMARY OF ARGUMENT

Each day, the Internet carries a vast array of speech having serious social, political, literary, artistic, medical, and educational merit. The CDA criminalizes much of this valuable

and constitutionally protected speech in a broad sweep that is not narrowly tailored to achieve its stated justification. In so doing, it chills the current and future speech of those who use the Internet. The *amici curiae* who submit this brief represent only a small fraction of the Internet speakers touched by the CDA's chill. The statute cannot achieve its stated ends without simultaneously inhibiting or prohibiting *amici*'s constitutionally protected and socially valuable speech.

The terms "indecent" in Section 223(a)(1)(B) of the statute and "patently offensive as measured by contemporary community standards" in Section 223(d) encompass speech by and to *amici* that has independent value for both adults and minors. By bringing such speech within its scope and chilling its dissemination, the CDA is unconstitutionally overbroad. The three-judge panel below correctly so held. *See American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 854-57 (E.D. Pa. 1996).

In illustrating this overbreadth, *amici* do not advocate access by all minors to all forms of expression on the Internet. *Amici* recognize, for example, that some valuable and protected speech that is appropriate for older teenagers may not be appropriate for elementary school children, and that some speech, while appropriate and even necessary for adults to express and to hear, may not be appropriate for minors under the age of 18. But as demonstrated by examples throughout this brief, the CDA fails to take these gradations into account, thus reducing all speech on the Internet to that appropriate for elementary school children. In the process, the CDA not only criminalizes protected speech, but also deprives *parents* of the freedom and responsibility to choose what their own children will access on the Internet. Parents understand their own children's maturity levels, life experiences, and needs to receive different types of speech far better than the government ever can, and, as appellees' briefs explain in detail, computer technology now has the ability to permit parents to make those selections for themselves. Accordingly, the CDA's censorship of all speech that the government deems "indecent" or "patently offensive" for minors is intolerable under the First Amendment.

ARGUMENT

In Criminalizing Speech with Serious Social, Political, Artistic, Literary, Medical, Journalistic, and Educational Value, the CDA Is Not Narrowly Tailored To Achieve Its Stated Justification

Great and emerging works of art and literature. Life-saving and life-enriching medical information. Social exchange and personal interaction. Expressions of opinion on issues of politics and societal concern. Journalistic reporting. Education on a wide variety of issues. — To some extent, the CDA potentially criminalizes all of these things. It makes unlawful the transmission of any not-otherwise-defined "indecent" communication (§ 223(a)(1)(B)) and the sending or display of any description of certain body parts that is "patently offensive as measured by contemporary community standards" (§ 223(d)). Those terms embrace much that is *not* obscene or pornographic, is *not* harmful to minors, and *is* protected expression under the First Amendment. For that simple reason, the CDA fails the overbreadth test. It is not narrowly tailored to achieve its stated objective of protecting minors.

Appellees, whom *amici* support, do not challenge any of the CDA's proscriptions against speech that is obscene or otherwise outside the scope of the First Amendment's protections. By definition, then, this action challenges only the CDA's prohibition of speech that *is* constitutionally protected. A statute is constitutionally overbroad if it presents a genuine likelihood that it will prohibit a substantial amount of speech that is beyond its permissible application. *See Massachusetts v. Oakes*, 491 U.S. 576 (1989); *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987); *Schad v. Mount Ephraim*, 452 U.S. 61 (1981). Because the speech placed on the Internet by *amici* and by appellees is protected speech under the First Amendment, the court below correctly held (929 F. Supp. at 851, 858, 867 n.2) — and the Government's brief does not appear seriously to contest — that the CDA's content-based criminal prohibition on that speech must be subjected to strict scrutiny. Whatever verbal

formula is used to describe this applicable standard, the CDA must be narrowly tailored to achieve its stated justification, no matter how compelling that justification may be, or, stated differently, must be the least restrictive alternative restriction on speech that will satisfy that objective. *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. __, 116 S. Ct. 2374, 2391-92 (1996).

This Court has held that an ordinance that prohibited the display of nudity at drive-in theaters but included in its sweep non-obscene films protected by the First Amendment was unconstitutionally overbroad. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975). The Court observed that while "[m]uch that we encounter offends our esthetic, if not our political and moral, sensibilities," nevertheless "the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer." 422 U.S. at 210. The Court noted that the Jacksonville ordinance, like the CDA here, discriminated among movies "solely on the basis of content," *id.* at 211, and that its effect would be "to deter drive-in theaters from showing movies containing any nudity, however innocent or even educational." *Id.* Rejecting arguments that protection of minors warranted the sweeping content-based prohibition in *Erznoznik*, the Court observed that minors themselves have a significant First Amendment right to receive speech and that this right is infringed by a law that "sweepingly forbids the display of all films containing any uncovered buttocks or breasts, irrespective of content or pervasiveness." *Id.* at 213. The Court added:

> Thus [the ordinance] would bar a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous. The ordinance also might prohibit newsreel scenes of the opening of an art exhibit as well as shots of bathers on a beach. Clearly all nudity cannot be deemed obscene even as to minors. Nor can such a broad restriction be justified by any other governmental interest pertaining to minors. Speech that is

> neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.

Id. at 213-14 (citation and footnote omitted). The Court's characterization of the Jacksonville ordinance could apply just as well to the CDA.

In enacting the CDA, Congress failed to recognize and provide for the First Amendment protection enjoyed by speech that has serious social, political, literary, artistic, medical, or educational merit. "Indecency often is inseparable from the ideas and viewpoints conveyed, or separable only with loss of truth or expressive power." *Denver Area*, 116 S. Ct. at 2416 (separate opinion of Kennedy, J.). But by ignoring the redeeming qualities of the speech, the CDA criminalizes *all* speech that might be viewed as "indecent" or "patently offensive as measured by contemporary community standards" in the hands of children, regardless of the value that the speech may have for children (particularly adolescents). And it utterly disregards the value of this speech to adults. The Government itself admits (Govt. Br. at 17-18) that "[t]here may be borderline cases in which it is difficult to determine on which side of the line particular material falls."[2] The CDA's sweep renders it unconstitutionally overbroad. "Quarantining the general [Internet] public against [transmissions] not too rugged for grown men and women in order to shield juvenile innocence . . . is to burn the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). *See Sable Communications v. FCC*, 492 U.S. 115 (1989).

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2. Although the Government and its supporting *amici* emphasize what they say is the narrow scope of the statute's provisions, their briefs in fact underscore the uncertainty created by the statute's breadth. For example, one *amicus*, Morality in Media, Inc., apparently views a broad range of AIDS-prevention materials and government documents discussing sexual violence as within the statute's proscription of "content that is indecent but not 'pornographic.'" *See* Br. of *Amicus* Morality in Media at 7-8.

A. The CDA Is Overbroad in Banning Speech of Content Providers.

The overbreadth of the CDA is best demonstrated by the speech that the *amici* content providers and others situated similarly to them regularly place on the Internet and that is endangered under the CDA's proscriptions. In contrast to the "ocean" of "pornography" postulated by the Government and its supporting *amici* (Br. of *Amici* Enough Is Enough, *et al.*, at 7), the affected speech deals with medical information about subjects ranging from cancer detection to AIDS; depictions of artwork ranging from established masterpieces in recognized museums to *avant garde* works in less renowned galleries; literary works ranging from classic novels and poetry to new compositions; speech on social and political issues ranging from sexual abuse to human rights; news reporting on all of these issues; and educational materials of similar scope. The speech ranges from the generally (although by no means universally) acceptable, to that which is less in the mainstream — though no less valuable. Under the CDA, all of it is criminalized.

➤ *Medical Information on the Internet.*

Medical information is widely available on the Internet. It includes descriptions and depictions of sexual and excretory activities and organs that in some "communities" may well be considered "patently offensive," or that some might consider "indecent," but which unquestionably have medical, scientific, social, and educational value. Some sites discuss the onset of puberty. Others discuss sexually transmitted diseases and means to avoid their transmission — an issue of obvious importance to youth and adults alike in today's world. Other topics include prostate cancer and surgery; testicular cancer and preventive self-examination; breast cancer and preventive self-examination; breast reconstruction after a mastectomy; breast feeding; childbirth; and sex during pregnancy. Discussion of these subjects necessarily entails frank and even graphic descriptions

that are within the CDA's scope despite their high social, medical, and scientific importance.[3]

The discussion of puberty on a World Wide Web page of Kaiser Permanente of Colorado called "TeenWeb: Boys, You are Changing," *http://www.kaiser-co.org/teenboys.htm* (Exhibit 1 to the appendix to this brief),[4] presents a vivid illustration of the ability of the Internet to convey medical information of interest to teens. The page explains:

> Boys in puberty start having more erections. This means their penis gets hard and stiff from time to time. This can happen when you touch or stroke your penis, if pants are too tight, or when you ride a bike. It can also happen when you are nervous, scared, tense, or when you're thinking about sex. This is because your sex organs are getting more sensitive.
>
> An erection is normal, although it's sometimes embarrassing because it is unpredictable. Try to ignore it. Usually only you notice it, not others. Think about something else and the penis will get soft and return to its normal size again. At some point, an erection will result in ejaculation. This means that semen, a creamy, white liquid containing sperm will squirt out of the penis. This can happen in

3. As Justice Kennedy pointed out last Term, "In scientific programs, the more graphic the depiction (even to the point of offensiveness), the more accurate and comprehensive the portrayal of the truth may be." *Denver Area*, 116 S. Ct. at 2416 (separate opinion).

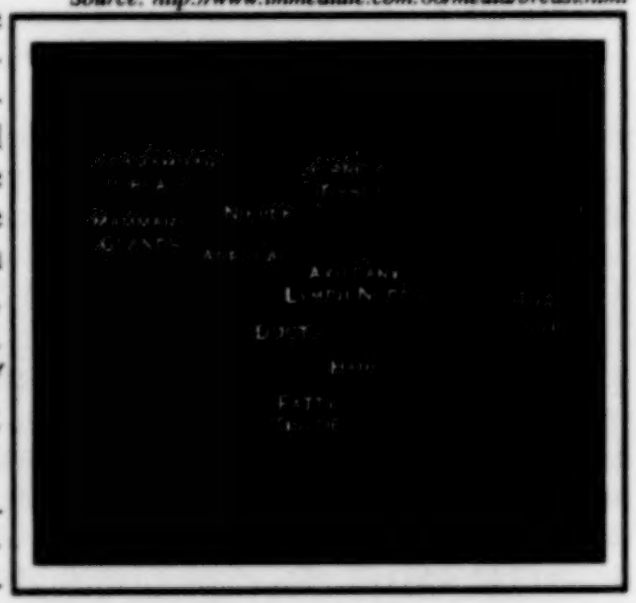
4. Printed copies of World Wide Web pages cited in this brief are included in an appendix of exhibits that is being lodged with the Clerk. That appendix — along with this brief itself — also is being lodged with the Clerk in electronic form (a compact disc) for the Court's convenience. Examples of some of the illustrations included on the Internet, along with citations to their sources, are reproduced throughout this brief in graphics boxes containing material downloaded from Web sites.

> your sleep and you may wake up with wet and sticky pajamas. People call this a "wet dream." This is a normal part of growing and nothing to feel ashamed about. When you start ejaculating, it means you are potentially able to cause a pregnancy in a woman since your body can make and deliver sperm.

The value of this type of information in educating young people about their bodies is readily apparent. The detailed and graphic nature of the description enhances that value, rather than reducing it. And the fact that presentations such as this are aimed directly at adolescents simply makes them more understandable to their intended audience. But even under the Government's new, narrower interpretations (not presented to the court below) of what it calls the "transmission" and "specific child" provisions of the CDA (*see* Govt. Br. at 24-27), the fact that these materials are "knowingly" directed to minors makes them a potential subject of criminal liability under all of the challenged provisions of the statute.

Similarly, illustrations and frank discussions of such important health matters as breast cancer detection through self-examination and the warning signs of penile cancer may fall within the broad language of the CDA. Such discussions, which are essential to informed discourse on these vital subjects, are not uncommon on the Internet. *See, e.g., http://www.immediate.com:80/media/breast.html; http://oncolink.upenn.edu/pdq_html/1/engl/101082.html* (Exhibit 2).

Source: http://www.immediate.com:80/media/breast.html



The same is true of sites candidly discussing surgical issues, such as breast reconstruction and penile prosthetics, and pregnancy issues, such as intercourse during pregnancy and post-caesarean vaginal birth. *See, e.g., http://web.mit.edu/pamurray/www/artbc.html*; *http://www.2020tech.com/mensurg/*; *http://www.enlarge.com/*; *http://www.uiuc.edu/departments/mckinley/health-info/womenhlt/sex-preg.html*; *http://www.childbirth.org/section/VBACFAQ.html* (Exhibit 3). Many of these sites publish photographs, drawings, or other depictions of sexual and excretory activities and organs — illustrations that are essential to convey information about these subjects. Under the overbroad scope of the CDA, all of their authors are subject to the threat of criminal prosecution. Because of that threat, the CDA potentially denies millions of Americans accurate sources of health information that could improve, and in certain cases even save, countless lives.

A paradigm example of legitimate — even compelling — medical material on the Web is information advising about how to avoid the sexual transmission of disease, particularly the transmission of HIV, the virus that causes AIDS. Such information is vital to adults, and may be even more vital to teens. The Web sites offering this information frequently are addressed to sexually active teenagers, a group most likely to engage in sexual experimentation and least likely to have adequate knowledge of how to avoid the dangers of "unprotected" sexual activity in today's world. Any effective delivery of meaningful sexual information to such an audience, which often is unsophisticated when it comes to medical terminology, requires the use of "street language" — including language that was at issue in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). In *Pacifica*, the Court held that a broadcast featuring George Carlin's use of seven specified "dirty" words in a comedy routine could be restricted to time slots when children were unlikely to be in the audience. According to the Conference Report to the CDA, H.R. Conf. Rep. No. 104-458, at 188-89 (1996), that decision sets the legal standard for determining whether speech violates the CDA's provisions that would ban from all sites and at all times (not just restrict to time

slots) all "indecent" and "patently offensive" speech. Yet, the *Pacifica*-like language that Congress seeks to ban completely from the Internet is essential to the communication of this critical medical information.

For example, *amicus* Coalition for Positive Sexuality authors a Web page designed to provide teenagers with comprehensive information about sexual issues.[5] As it states on that page, "We chose words . . . that we use when we talk about sex with our friends. We're not doctors and we don't pretend to be, so pardon our French!" *See http://www.positive.org/cps/jsy/jsy.html* (Exhibit 6). The site contains detailed and graphic information about "safe sex" practices, including illustrated instructions about how to use a condom, which is an essential element in preventing the spread of HIV. *See id.* at *http://www.positive.org/cps/jsy/safe_sex.html*. Those instructions are frank, friendly,

Source: http://www.positive.org/cps/jsy/safe_sex.html

HERE'S WHAT YOU DO:

1. **Get ready.** Make sure your condoms are fresh – check the expiration date. Throw away condoms that have been very cold or hot or that have been carried around in your wallet or run through the washer. If you think the condom might not be good, get a new one. You and your partner are worth it.

5. There are a number of such sites on the Web. For example, the site of *amicus* Tri Dang Do, a medical student at Boston University, includes a page that provides education to teens on sexually transmitted diseases. *See http://med-www.bu.edu/people/sycamore/std/std.htm/* (Exhibit 4). Another illustrative site is Healthwise, the Health, Education and Wellness program of Columbia University Health Service, which includes an award-winning feature entitled "Go Ask Alice," an interactive question and answer service explicitly dealing with sexual health and relationships. *See http://kwaziwai.cc.columbia.edu/cu/healthwise/alice.html* (Exhibit 5).

colloquial, and unvarnished. *See, e.g., id.* ("That dick has to be hard before you put a condom on it"; "Guys — if you cum in the condom while having sex, hold the condom near your balls and pull out while you're still hard").

The language used in these examples undoubtedly is crude, distasteful, or shocking to many segments of society. But it is the language most likely to be understood by an intended audience that, as the phrase "street language" implies, makes use of such words every day. Although the examples in the preceding paragraph do not contain any of the precise "seven dirty words" from *Pacifica*, no one has suggested that Internet users can avoid criminal liability simply by shunning these seven words, and, in any event, other paragraphs from the Coalition for Positive Sexuality's Web site do contain the *Pacifica* language. *See generally http://www.positive.org/cps/jsy/jsy.html* (Exhibit 6). The language used on its site is just as likely to strike censorious adults as "indecent" or "patently offensive" as the words at issue in *Pacifica*, and it is precisely such language that, according to the conference report, the CDA was intended to ban. That ban is oblivious to the instructional value provided by frank speech of this type, and a statutory proscription of such speech merely because minors — those arguably most in need of the information — may receive it is unconstitutionally overbroad.

Of course, the language used in the foregoing examples will, for many people, be just one small source of objections. For many, *any* frank discussion of sexual topics is indecent, regardless of the words used, and that certainly is true when the discussion turns to more stigmatized sexual practices, such as oral or anal intercourse. Additional objections may be triggered by a discussion of gay or lesbian relationships or sexual conduct between persons of the same sex. Add the thought of minors participating in such activities, and, for many, a conclusion of "indecency" and "patent offensiveness" will follow *a fortiori*.[6]

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6. Community efforts to control public school curriculums have often focused on sex education. *See* Polner, "The Four Forbidden Words," *Newsday*, Feb. 5, 1996, at A03; Baumman, "Groups Pushing Parental Rights," *The Des Moines Register, Metro Iowa*, Feb. 3, 1996, at 5. Similarly, much of the effort to remove books from public school libraries, discussed at pages 17-18, *infra*, has been aimed at sexually explicit literature, including books specifically aimed at helping teenagers deal with their emerging sexuality. *See* "State Ranks 9th in Censorship Tries," *Wisconsin St. Jour.*, Sept. 2, 1993, at 2B; "Panel Says Ban Judy Blume Novel," *Wisconsin St. Jour.*, Mar. 31, 1993, at 3D.

But it is a well-known fact that such sexual activities are a part of the experiences of many teenagers (as well as large groups of adults) today. And it is a depressingly well-known fact that many of these activities can be fatal without proper precautions and advice. Life-saving advice about how to take those precautions therefore cannot be dismissed as too indecent to be communicated. Nevertheless, the CDA is broad enough to sweep it within its prohibitions.

➤ ***Artwork on the Internet.***

With increasing frequency, art institutions are placing home pages on the Internet. Museums have created Web sites or home pages not only to discuss their exhibits and provide a cyberspace forum for art aficionados, but also to display art on the Internet. The overbreadth of the CDA's "indecent" and "patently offensive" prohibitions ensures that the subjective opinions forming the basis of art appreciation now must take a back seat to concerns about what the government or certain unspecified "communities" may deem unacceptable.

The numerous art galleries, museums, and other art institutions on the Internet include the Metropolitan Museum of Art, Whitney Museum of American Art, Smithsonian Institution, and the Vatican Museum. Frequently, their sites provide descriptions of their galleries with links to some of the images displayed there and guided tours through some of the collections. *See, e.g., http://cac.psu.edu/~mtd120/palmer/lobby.html* (Palmer Museum of Art; Exhibit 7). Typically, these sites also include links to the Web pages of other art institutions, and some sites even have provided search mechanisms to assist in locating other

Source: http://www.christusrex.org/www1/sistine/6-Expulsion.jpg

art-related sites and have created links to allow access to those sites. *See, e.g., id.* One organization, World Wide Arts Resources, provides an extensive directory of art institutions on the Internet that includes among its lists a full page of "nude resources." *See http://wwar.com/creator/nudes.html* (included with Exhibit 7). The art institutions' Web pages display a diverse array of art, ranging from such Sistine Chapel nudes as the *Expulsion of Adam and Eve, http://www.christusrex.org/www1/sistine/6-Expulsion.jpg* (Exhibit 8) (works that themselves, until just a few years ago, were covered with strategic drapes of paint because church authorities found the lack of clothing indecent), to modern art collections. Creators and purveyors of such works now have a reasonable fear of prosecution under the CDA for these activities because the CDA encompasses so much.

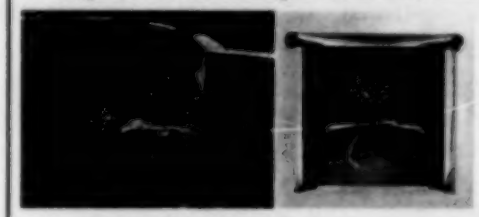
The value of an unfettered display of art on the Internet cannot be exaggerated. With the exponential growth of the Internet and the ability of Web sites to reach millions, the potential for exposure to art is unbounded. Internet users everywhere can view paintings, drawings, and sculpture housed in museums or other collections located thousands of miles away without ever having to leave their homes. *See, e.g., http://www.whitehouse.gov/WH/EOP/First_Lady/images/raw/gard6.gif* (Exhibit 9) (one example of sculpture shown on Internet; other examples of artwork on Internet are collected under that same exhibit number). Far more people can experience art of all varieties through this medium than through any other, including libraries or television, simply because of the

Internet's unprecedented capacity for transmitting information. There also can be no doubt that adults are not the only beneficiaries of this broadened participation in the art world. Art education is invaluable to people of all ages.

Appreciation of selected works of art is, of course, a most subjective judgment. In 1989, for example, Washington's Corcoran Gallery refused to show an exhibition of bold photographs taken by Robert Mapplethorpe, organized and initially shown without objection by the University of Pennsylvania's Institute for Contemporary Art, even though Mapplethorpe was a National Endowment of the Arts grant recipient and many had acclaimed his work. A Cincinnati museum director was arrested on obscenity charges for choosing to show the exhibit, but the jury returned a not-guilty verdict, finding that the art was not obscene. *See* Hartigan, "Mapplethorpe's 'Chilling Effect': A Year Later, Battle Goes On," *The Boston Globe*, Oct. 6, 1991, Sunday, City Edition, p. 1. To many, the exhibit, which included homoerotic photographs, was indecent. To many others, the photographs were modern artistic expressions deserving of exhibition and appreciation. This case demonstrates the dangers posed by a law criminalizing speech based on "community standards" of offensiveness. As the court below observed (929 F. Supp. at 844), Mapplethorpe's works are among those now

Source: http://www.cmp.ucr.edu/exhibitions/w_m/wm2.html

A comparison of *Weston's Nude Floating*, 1939 and Mapplethorpe's *Thomas*, 1986, provides one example of the shift in context presented by this exhibition.



Weston's *Nude Floating*, 1939, an image of a woman floating face up in a swimming pool, with Mapplethorpe's *Thomas*, 1986, an image of a nude man tautly posed in a square structure. Here, the modern, formal analysis usually applied to Weston's work expands to embrace postmodern themes rooted in societal relationships, gender, race, and sexuality. Likewise, Mapplethorpe's work examined next to Weston's invites the viewer to look beyond the lingering NEA controversy and see the image for its formal complexities in the tradition of modernist photography. In both cases the comparisons serve to more firmly ground the artists' work in 20th century art practice.

CAPTIONS:
Edward Weston, *Nude Floating*, 1939, Special Collections, UC/Santa Cruz
Robert Mapplethorpe, *Thomas*, 1986, Robert Mapplethorpe Foundation, © 1986, Estate of Robert Mapplethorpe. Used by permission

exhibited on the Internet and (once again) in danger of prosecution. *See, e.g., http://fileroom.aaup.uic.edu/FileRoom/documents/Cases/337mapplethorpe.html* (Exhibit 10). *Amicus* California Museum of Photography at The University of California, Riverside, is just one of those exhibitors. *See, e.g., http://www.cmp.ucr.edu/exhibitions/w_m/wm2.html*(Exhibit 11). Subjecting its educational site to the threat of criminal prosecution because it is available to minors would be both ironic (it is part of a state university system) and stifling, but the CDA nevertheless has that effect.

The First Amendment does not tolerate banning non-obscene art works merely because of differing subjective judgments. But the CDA subjects art exhibited on the Internet to precisely that damage. In certain communities, even such classic works as Michelangelo's *David* and the now-undraped Sistine Chapel may fall within the broad language of the CDA.

The CDA will chill, and indeed cripple, this valuable use of the Internet. Where art that some may consider potentially "indecent" or "patently offensive as measured by contemporary community standards" is already on the Internet, the museums and other institutions that have placed it there may be exposed to criminal prosecution. Museums, galleries, and individuals now must choose between placing art on the Internet that some might find objectionable, thus opening themselves up to prosecution, or deliberately excluding from their Web sites important art that is protected under the First Amendment. Simply put, the choice for these *amici* — as for all the *amici* — is between prosecution for free speech or chilled speech. The First Amendment protects against such a choice.

➤ ***Literature on the Internet.***

Like art, literature is particularly susceptible to differences in interpretation. That is as true on the Internet as it is on bound pages. The CDA's overbreadth fails to acknowledge that one

Internet user's literature is another's "indecent" or "patently offensive" communication.[7]

Communities throughout the United States have on occasion banned classic literature from libraries, purportedly for being harmful to minors. *See, e.g.*, Dist. Ct. Br. of Pl. Amer. Library Assn. in Support of Mo. for Prelim. Inj., Ex. 19, at Ex. O. The banned works include Whitman's *Leaves of Grass*, Joyce's *Ulysses*, Voltaire's *Candide*, and Chaucer's *The Canterbury Tales*, all of which are now on the Internet. *See http://kwaziwai.cc.columbia.edu/acis/bartleby/whitman/index.html; gopher://wiretap.spies.com:70/00/Library/Classic/canterbury.txt; gopher://gopher.vt.edu:10010/02/155/1; http://www.bibliomania.com/Fiction/joyce/ulysses/* (Exhibit 12). This Court itself has determined that another target of would-be book banners, *Fanny Hill* by John Cleland, is not obscene. *See Memoirs v. Massachusetts*, 383 U.S. 413 (1966). It too is on the Internet. *See gopher://wiretap.spies.com:70/00/Library/Classic/*

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7. Yet another indication of the CDA's overbreadth is the irony that results from the availability in the print media of speech identical to that banned on the Internet under the CDA. Although, as discussed in the main text, book-banning efforts are not uncommon, no federal statute purports to authorize such silencing of protected speech. In books, magazines, and newspapers, adults and minors alike therefore have lawful access to information and other forms of speech of the same nature as that falling under the CDA's rubric of "indecent" or "patently offensive." While the Internet, because of its limitless capacity for providing forums for individual speakers, expands the *amount* of information available in other media, it does not necessarily expand the *types* of information available there. Thus, minors can check out books from libraries, purchase books or magazines or newspapers in bookstores or from other vendors, or subscribe to periodicals in their home, all containing speech of the same sort that they are now legally prohibited from receiving on the Internet. And, publishers in the print and even broadcast media can disseminate that speech while those on the Internet cannot. In failing to be sufficiently tailored to narrowly achieve its stated ends, the CDA fails both to meet those ends and to pass constitutional muster.

fannyhill.txt (Exhibit 13).[8] Considering their track records, there is no reason to believe that communities that have tried to ban or exclude from libraries books in print form will not target them as being "indecent" or "patently offensive" when transmitted, to minors among others, over the Internet. The reasonable fear of prosecution that this prospect will instill in speakers who place all or portions of these works on the Internet renders the CDA unconstitutionally overbroad.

The CDA gives communities an ostensible legal basis for what amounts to online book banning, even though courts have held that removal from school libraries of hard copies of these same works violates of the First Amendment. *See Minarcini v. Strongville City School District*, 541 F.2d 577 (6th Cir. 1976). Even works of a less literary nature are protected when in print form. *See, e.g., Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988). No different result should obtain when such works are placed on the Internet. Yet under the CDA, a very different result, of criminal proportions, will obtain. Despite the Government's argument to the contrary, there is nothing in the language of the CDA that permits consideration of the literary, social, or historical merit of a targeted literary work.

The so-called "classics" are not the only literature transmitted on the Internet that the CDA endangers. *See, e.g., http://www.igc.org/Womensnet/dworkin/New.Womans.Broken.Heart.html; http://www.igc.org/Womensnet/dworkin/IntercourseI.html* (Exhibit 15) (short stories by noted feminist Andrea Dworkin). Perhaps even more so, newly composed works by emerging authors and poets are likely to be the target of the "indecency police." The Internet is a ground-breaking medium for innovative authors because they can publish and disseminate their literary creations without the need for traditional agents and publishing houses or for personal financial

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8. Some classic literature also is available on the Internet in audio format. *See, e.g., http://www.wbr.com/nakedlunch/ajparty.wav* (Exhibit 14) (excerpts from *Naked Lunch*, as read by author William S. Burroughs).

expenditures. On the Internet, they can share their works with readers and fellow writers, exchange criticism and suggestions, hone their craft, and achieve satisfaction knowing that others are finding enjoyment or inspiration reading their works. Yet works placed on the Internet that touch on such things as the sexual aspects of love and romance can be expected to be prime targets for those quick to find "indecency."

Groups such as *amicus* Creative Coalition of Artists, an organization of online poets, have felt the chill from this overbreadth. Even prior to the final enactment of the CDA, America OnLine removed dozens of poems from Creative Coalition's Poetry Corner in response to demands of some who believed that the use of words such as "breast" rendered the poems indecent. Some poems were removed for no discernible reason whatsoever, making it impossible for their authors to understand what language had been considered "indecent" and therefore had to be avoided. *See http://motley-focus.com/~timber/aol.html* (Exhibit 16). Now the vagaries of "indecency" also carry the threats of *government* censorship and criminal prosecution.

Nor is the scope of the CDA limited to books. Technological innovations now make it possible to transmit and receive not just text and pictures on the Internet, but also motion pictures, television and theatrical productions, and musical compositions (as well as scripts and lyrics from those works). These contemporary compositions sometimes contain explicit sexual themes or lyrics. Just one example of a contemporary musical composition with a sexual theme and lyrics is Alanis Morissette's *You Oughta Know*, which won the 1996 Grammy Award for Best Rock Song of the Year. The song is on the Internet in three available formats: the lyrics, the audio version, and the music video. *See http://http.tamu.edu:8000/~vkb5818/Alanis_Morissette_V2.0/Alanis_Lyrics/oughta.html; http://www.animatrix.com/Alanis_Morissette/ra/Oughta.wav; http://mbess.ccsm.uiuc.edu:80/alanis/know1.mov* (Exhibit 17). *See also http://www.aswellas.se/drdre/dreday.wav* (Exhibit 18) (another example of sexually controversial pop musical compositions on Internet in audio form); *http://www.homevisioncinema.com/*

catalog/thatobscure.alarge.mov (Exhibit 19) (example of movie clips from sexually explicit non-obscene foreign films). Such new compositions on the Internet are in jeopardy under the CDA.

➤ ***Social and Political Discourse on the Internet.***

Issues of social and political import are widely discussed on the Internet. Certain issues implicate topics of discussion that fall squarely within the overbroad language of the CDA, and yet are both vital to informed discourse in a democratic society and fully protected under the First Amendment. They include, but certainly are not limited to, sexual abuse and human rights issues.

For example, Karra's Korner and The Survivor's Page are Web sites dedicated to sexual abuse and rape survivors. *See http://www.xroads.com/rainbow/karra.html*; *http://cam043212.student.utwente.nl/* (Exhibits 20 and 21). They include chat rooms offered as a forum for survivors to share their experiences and recoveries with one another, and pages for posting original poems and stories composed by them. Ed Carp, an *amicus* in the court below, operated a similar site called "Khijol" that was dedicated to survivors of sexual abuse; it has since been removed from the Web. It is impossible for such sites to avoid occasionally describing or depicting sexual activities and organs in a manner that would, as measured by the contemporary standards of some communities, be patently offensive. Considering the nature of the issue, it would be unreasonable and unrealistic to expect otherwise. Unfortunately, these realities are no impediment to the CDA's reach.

It would likewise be undesirable for such sites to prevent minors from participating, considering that sexual abuse often is perpetrated on minors. Even if it were technologically possible for those who maintain such Web sites to exclude minors (which it is not), such a restriction would undermine the sites' very purpose and impair their ability to fulfill their mission. One site, for example, deals explicitly with ritual abuse. *See http://www.xroads.com/rahome/rahome.html* (Exhibit 22). Others address

family violence, sexual abuse, and child abuse, all linked by common sites such as that of Internet Support Groups. *See http://www.xroads.com:0080/rahome/support.htm*; *http://www.vix.com/pub/men/abuse/abuse.html* (Exhibit 23). Still another site carries writings, letters, and poetry by survivors. *See http://cam043212.student.utwente.nl/Writing.htm* (Exhibit 24). To deprive these Internet users of the ability to speak, communicate, and assist one another — having survived (or being still trapped in) the horrifying experience of sexual abuse — would be yet a further violation. But the authors of sites like these realistically may be concerned that they now face prosecution for providing this service and may be unable to continue doing so.

Similarly, it is essential to the mission of human rights organizations such as Derechos, an *amicus* here, to inform about the nature of human rights abuses wherever and in whatever form they occur. Too often, such abuses include physical atrocities relating to the victims' "sexual or excretory organs." However distasteful, difficult, or "offensive" this topic may be for some to confront, it is speech of truly serious social and political merit. Educating about human rights abuses, and persuading people to fight against them, is a vital form of speech on the Internet.

For example, *amicus* Margarita Lacabe, who authors the Derechos Web site, includes on that site excerpted personal accounts of torture, including sexual torture of both men and women, recounted in *Nunca Mas* (*Never Again*), the Report of the Argentine National Commission on the Disappearance of Persons, which details the disappearance of 9,000 people in Argentina in the 1970s. *See http://www.derechos.org/indecent.html* (Exhibit 25). They include the following:

> . . . At some point he feels that they pick him up, they take him through a corridor to another place, where they order him to undress, they throw him on a cot and they say to him: "Look, I am 'El Aleman,'" while the victim was hearing women and men screaming. "El Aleman" tries to introduce a pipe into

his anus. Another voice tells them to leave him, and speaking to the victim, he says: "you see, I am 'El Gallego,' and saved you from him putting the iron bar in you." They put him naked, with his legs and arms opened, tied with leather. "El Gallego" tells him to speak, while he applies an electric shock on his ankle, burning his muscles, he still has the marks. He is also interrogated by a woman. "El Gallego" applies the "picana" [electric cattle-prod-like instrument] on his armpits, where he also still has the scars. "El Gallego" laughed and tells the woman: "You, you like the piece, you continue." Then he feels as the woman takes his member and introduces in it some caustic-like liquid, and because of this he still has problems urinating.

. . . Then they proceeded to introduce in my vagina what I knew afterwards to be a baton or a police stick. Then they took me to another building, where they made me eat handcuffed to a table. When I refused to, they took me to another building, where they would make me stand and go back to interrogating me, hitting me on the head and threatening to introduce the stick I mentioned before in my anus.

Many of the victims of such torture were themselves younger than 18. To omit from Internet coverage of human rights abuses such personal accounts as these, written by those who have suffered through them for the sake of the values they champion, would be to silence voices of experience, education, and warning. Nevertheless, the CDA is broad enough to do so. The CDA forces authors of home pages dedicated to these issues, and users of those pages, to make a choice between emasculating their speech by omitting descriptions and depictions of human rights abuses, or risking criminal prosecution for speaking out. The First Amendment does not tolerate that choice. Indeed, the irony of our democratic government silencing speech on human

rights abuses inflicted by non-democratic regimes should not be lost on the Court.

Of course, the story of the Argentine disappearances, like many of the reports of human rights abuses on the Internet, is historical and serves only to warn readers: "Never again," as to crimes against humanity that have already occurred. But abuses involving "indecent" and "patently offensive" behavior also are perpetrated today, and the Internet is the quickest and most effective tool for exposing them. One wonders whether the disappearances — or indeed the Holocaust — would have occurred so brazenly if the Internet had been reporting on them twenty or sixty years ago. Yet the graphic reports that might have caught the world's attention would have been threatened with criminal prosecutions under the CDA.

➤ ***Journalism on the Internet.***

The news media have gone online. Hundreds of news providers in the United States alone, ranging from daily newspapers to weekly news periodicals to broadcast news agencies, have placed home pages on the Internet. Countless more around the world have done so, and are accessible by computer users in this country. Some individuals and groups have created home pages to link these news sites together for ready access by Internet users eager to receive information on current events via computer, rather than the traditional print and broadcast media.

Information in news sites online contains a wealth of speech that inevitably will include speech considered by some to be "indecent" or "patently offensive." High on that list are reports or photographs regarding the various other subject areas that are discussed in this *amicus* brief. Medicine, art, literature, and social and political issues of all kinds are covered by the news media. The Internet coverage of them is no different. *See, e.g., http://www.phillynews.com/packages/tibet/TENZ08.html* (Exhibit 26) (recent *Philadelphia Inquirer* article concerning torture and abuse of nuns in Tibetan prison); *http://detnews.com/menu/stories/19449.htm; http://detnews.com/96/nation/*

9701/03/01030061.htm (Exhibit 27) (recent *Detroit Free Press* articles about treatments of yeast infections in women and impotence in men). The angry posturing of combatants in war, at the scenes of crime, in the political arena, outside abortion clinics, or in other newsmaking settings will often provoke the use of language adjudged by some to be indecent. And from television footage of the napalm bombing of Vietnam villagers, *e.g.*, *http://www.portoftacoma.com/colovos/VIETNAM/08/00000438.JPG* (Exhibit 28), to classic *National Geographic* reports on indigenous peoples in less developed parts of the globe, *e.g.*, *http://www.nationalgeographic.com/modules/contact2/briefing/clickup/portfolio-k3.html* (Exhibit 29), the daily parade of news events will often result in compelling photojournalism. Under the First Amendment, coverage of such issues, disturbing though they may be, is not limited to material suitable to minors. *Cf. Herceg*, 814 F.2d at 1020 (First Amendment protected article detailing life-threatening sexual act, even though adolescent who obtained article died trying to imitate act).

It is reasonable for those who place their reporting on the Internet to fear prosecution under the CDA. Precedent as to the print and broadcast media demonstrates the propensity of some

Source: http://www.portoftacoma.com/colovos/VIETNAM/08/00000438.JPG

people to view factual reporting, which is at the core of the First Amendment, as "indecent" or "patently offensive." For example, when National Public Radio in a profile of John Gotti aired an evidentiary tape used in court that included Gotti's repetitive use of expletives, a listener sued the Federal Communications Commission to force the agency to punish NPR. *See Branton v. FCC*, 993 F.2d 906 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 1610 (1994).

Nevertheless, journalists cannot and should not shy away from coverage of topics within the potential scope of the CDA, for such topics are of legitimate public concern. The CDA raises the stakes in covering such issues. Despite the public interest in government funding of the works of controversial artists, which has led to extensive media coverage over a period of years, the CDA might, for example, have subjected the media to threatened prosecution for describing one of the works in question, Andres Serrano's "*Piss Christ*," as a crucifix placed in jar of urine, which many certainly would find offensive, or for reporting Serrano's explanation of that work. *See http://www.collegian.psu.edu/archive/1996_jan-dec/1996_oct/1996-10-02_the_daily_collegian/1996-10-02d01-001.htm*; *http://www.artsusa.org/Advocacy/flatline.htm* (Exhibit 30). Similarly, just a few months before the decision below was rendered, *Philadelphia Magazine*, an *amicus* here, reported on male prostitution in Center City, Philadelphia. *See* "The Vampires of Delancey Street," *Philadelphia Magazine*, March 1996, p. 64. The report's necessarily graphic content raised a specter of criminal liability under the CDA in the event of Web publication.[9]

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9. As the Serrano reporting demonstrates, these concerns are not limited to professional news organizations, but apply equally to less traditional publications like on-line college newspapers, many of which contain articles with frank discussions of sexuality. *See also The Daily Californian* (Univ. of Cal., Berkeley), *http://www.dailycal.org/Issues/09.09.96/condoms.txt* (Exhibit 31); *The Daily Pennsylvanian* (Univ. of Pa.), *http://www.dp.upenn.edu/AppleSearch.acgi$RETRIEVE,13,11964,5506,0,6927,0* (Exhibit 32). They also apply to organizations seeking to issue press releases about these topics. For example, the

The CDA places a gag on those who would report the news, forcing them to engage in self-policing far beyond anything required in the print media (to which the Internet is most analogous) or even the broadcast media. The CDA ban on speech applies twenty-four hours a day, seven days a week, every day of the year. Unlike the broadcast restrictions approved in *Pacifica*, there is no "adult" time zone available here, and no recognition of the utility of scrambling mechanisms. The gag on the Internet is complete and total.

➤ *Education on the Internet*

The Internet is a powerful teaching and research tool. In universities, for example, professors use the Internet to supplement printed materials available to students, some of whom are minors, in order to offer more comprehensive treatment of facts and issues. The ready access to information made possible by the Internet, in addition to smaller local area networks within university communities, enhances the educational experience. Professors use the Internet not only to teach courses covering the subjects discussed in the foregoing sections of this brief — for example, medicine, anatomy, biology, art, social work, journalism, and human rights — but also courses on such issues as the social and psychological effects of pornography and the philosophical implications of cyberspace. This is accomplished by posting course materials on Web sites; transmitting, via e-mail, information located elsewhere on the Internet; encouraging students to explore the information available on the Internet in a particular subject area; and, in many cases, by a combination of all of these methods. And as discussed later in this brief, professors also utilize the Internet in their own research and to communicate and exchange information with their colleagues at other institutions.

CDA's restrictions could impede *amicus* Lambda Legal Defense and Educational Fund's ability to disseminate information about a recent litigation victory involving anti-gay abuse of a teenager that included a mock rape.

For example, *amicus* Peter Ludlow, an Associate Professor at the State University of New York at Stony Brook, places online all of his course materials for his course, entitled "Conceptual Issues in Cyberspace." The course covers, in an online context, such issues as the nature of online sexual behavior in multi-user online games known as "MUDs." The very reason that some materials are used in the course is that they are construed by some as "indecent," and an analysis of that construction is part of what the course addresses. Transmitting these materials, even in the context of providing a comprehensive academic analysis, may itself be construed "indecent" and, therefore, criminalized by the CDA. Certainly the wide-sweeping CDA does not provide for consideration of the context in which materials are placed on the Internet. For that reason, Professor Ludlow chose to change his approach to using online course material for his class last semester on moral reasoning as applied to the Internet, which included materials actually subject to censorship and thus considered by some to be "indecent" or "patently offensive" *per se*. While most of the readings for the course were made available online, Professor Ludlow felt unable to provide online copies of the more controversial materials, concerned that if the CDA were in effect he could be subject to prosecution under its provisions for his teaching activities.

The CDA therefore poses a threat to academic freedom, which requires broad latitude for teaching and research in the pursuit of truth and knowledge. *See, e.g., Keyishian v. Board of Regents of University of State of New York*, 385 U.S. 589, 603 (1967) (recognizing importance of academic freedom to democracy). The *1940 Statement of Principles on Academic Freedom and Tenure*, adopted 57 years ago by *amicus* American Association of University Professors and endorsed by more than 150 professional organizations and learned societies, applies fully and forcefully in the context of the Internet of the 1990s: "Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning." AAUP Policy Documents

& Reports (1995 ed.); *see http://www.igc.apc.org/aaup/1940stat.htm* (Exhibit 33). The criminal proscriptions of the CDA would eviscerate vast realms of teaching and learning materials, to the detriment of both teachers and students, both adults and minors.

The CDA also stifles access to information available in libraries, including those affiliated with institutions of higher learning. "A library is a mighty resource in the free market place of ideas. It is specially dedicated to the broad dissemination of ideas. It is a forum for silent speech." *Minarcini*, 541 F.2d at 582-83 (citations omitted). Yet, while materials available in print form are fully accessible to minors and adults, the CDA prohibits the same access on the Internet. And, while a library has the freedom to choose what books and periodicals to include in its collection, so that it can identify and eliminate works it determines to be unsuitable, the CDA prevents it from relying on its own judgment of what Internet sites its users may access. By making access to the Internet available to minors, a library or individual librarian now risks prosecution under the CDA.

B. The CDA Also Is Overbroad in Banning Speech Sought by Content Recipients.

It is not only speakers on the Internet who feel the chill posed by the CDA. The millions who access speech on the Internet feel it as well. They do not open themselves up to criminal prosecution, as do content providers (although, if they download the content into e-mail messages to minors or otherwise disseminate questionable content so that it may reach a minor, they risk becoming content providers themselves). But they are deprived of access to speech with serious redeeming merit which they are entitled to receive under the First Amendment.

Recipients of speech are equally entitled to protection under the First Amendment. That protection is afforded "to the communication, to its source and to its recipients both." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976). The "right of the public to receive suitable access to social, political, esthetic, moral, and other

ideas and experiences" is "crucial" and "may not be constitutionally abridged" by statute or regulation. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). Nevertheless, the CDA violates this principle.

Several of the *amici* experience the chill of the CDA from the perspective of a recipient of speech. For example, Lloyd K. Stires, a social psychologist and professor who teaches a seminar entitled "Pornography: Critical, Behavioral and Legal Approaches" at Indiana University of Pennsylvania, conducts research for the course on the Internet. The CDA jeopardizes his ability to research non-obscene speech protected by the First Amendment. *Amicus* American Association of University Professors represents thousands more like Professor Stires, who increasingly depend on the Internet as a source of information on a host of issues, and a teaching tool for students who include minors. Many such controversial issues, or the approaches that professors might choose to bring to more mundane issues, will undoubtedly infringe on the sensibilities of some communities sufficiently to bring within the chilling scope of the CDA both professors who access "indecent" or "patently offensive" information from the Internet, and those who post it there.

Similarly, Miryam Ehrlich Williamson, a freelance technical journalist who conducts nearly of all her research on the Internet and whose topics have included medical disorders that affect "sexual or excretory activities or organs," may eventually find under the CDA that the Internet has become, not a font of information, but rather a dry well for some of those topics. That will also be true for journalists, who rely increasingly on the Internet as an invaluable research tool. The ban affects all users, including those serviced by *amicus* Eric Raymond, a director of Chester County InterLink, a Pennsylvania ISP that provides free access to the Internet for those who are economically disadvantaged and physically challenged. As these examples illustrate, the CDA would potentially freeze out entire segments of society from exercising their First Amendment right to participate in this new high-tech marketplace of ideas.

The CDA, particularly because it poses the harsh sanction of criminal prosecution, decreases the likelihood that in the future there will be speech on the Internet that these *amici* can view and use for undeniably legitimate purposes. In this way as well, the CDA is unconstitutionally overbroad.

CONCLUSION

For the foregoing reasons, *amici curiae* urge the Court to affirm the decision of the three-judge panel that preliminarily enjoined enforcement of the Communications Decency Act of 1996, and to declare the Act unconstitutional.

Respectfully submitted,

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Dated: February 20, 1997.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The **American Association of University Professors** (AAUP) is an organization of approximately 44,000 faculty members and research scholars in all academic disciplines. Founded in 1915, the Association is committed to the defense of academic freedom and the free exchange of ideas in scholarly and creative work. Among the organization's central functions is the development of policy standards for the protection of academic freedom, tenure, and other elements central to higher education. The Association's policy statements have long emphasized the need for wide latitude in teaching and research for professors and their students in the pursuit of knowledge — including with regard to controversial topics or examples that are relevant to the subject matter. *See, e.g., 1940 Statement of Principles on Academic Freedom and Tenure*, AAUP Policy Documents & Reports (1995 ed.) (endorsed by more than 150 professional organizations and learned societies). AAUP's policies are widely respected and followed as models in American colleges and universities. *See, e.g., Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 579 n. 17 (1972); *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971).

Faculty members rely increasingly on the Internet for teaching and research. AAUP is concerned that the CDA will chill on-line expression and discussion on a wide variety of academic subjects (*e.g.*, medicine, biology, anatomy, social work, art, and journalism), impairing use of this promising new medium for legitimate pedagogical and research purposes in the pursuit of truth and knowledge.

The **American Society of Journalists and Authors** is a professional association representing journalists and authors, primarily in the print media, many of whose works are placed in whole or in part onto the Internet. Claire Safran is the Chairperson of the ASJA's First Amendment Committee and its *amicus* contact person. The ASJA and its members are concerned that the CDA will prohibit certain writings from being placed on the Internet and chill free expression online. *See* Exhibit 35.

The **Authors Guild** is a national association of almost 7,000 professional book and periodical writers of all genres, including journalists, historians, biographers and other writers of fiction and nonfiction. Founded in 1912, it is the oldest and largest organization of published writers in the United States. Members of the Authors Guild include winners of the Pulitzer and Nobel Prizes, National Book Awards, and other prestigious awards and prizes. The Authors Guild works to promote the professional interests of its members and to educate the community at large on issues facing publishing-related industries.

One of the Authors Guild's principal purposes is to express its members' views in cases involving questions of freedom of expression and to support that fundamental constitutional right. Many of its members rely heavily on the extraordinary opportunity for free and open communication offered by on-line services and the Internet, which allow its members to participate in a true "marketplace of ideas." The Authors Guild opposes the CDA because it will chill free speech in this important forum.

Since 1993, the **California Museum of Photography at the University of California, Riverside** has been producing exhibitions on the Internet that combine both fine art and scholarship. *See generally http://www.cmp.ucr.edu/frames/intro.html* (Exhibit 36). Projects such as a comparison of the work of photographers Edward Weston and Robert Mapplethorpe would be restricted by the CDA. *See http://www.cmp.ucr.edu/exhibitions/w_m/wm2.html* (Exhibit 11). Further, the California Museum of Photography at the University of California, Riverside has long championed the concept of the Internet as an expressive medium for both individual artists and for collaborative activities. Provisions in the CDA could prohibit both advanced scholarship in the visual arts and practice by contemporary artists exploring the unique attributes of the Internet as a medium for pictorial discourse and active collaboration across state and international boundaries.

The **Coalition for Positive Sexuality** is a grassroots volunteer group originally formed by high school students and members of various AIDS awareness, pro-choice, women's health, and gay rights groups to respond to what it identified as a health crisis among Chicago teenagers in terms of teen pregnancy, sexually transmitted diseases, and lack of awareness of issues relating to homosexuality. Its purpose is to provide teens with comprehensive information on sexuality and reproductive control, and to stimulate debate on the quality of sex education in public schools and around the country.

The Coalition maintains a Web site directed to teenagers and intended to provide accurate information on sexuality. *See http://www.positive.org/cps/* (Exhibit 37). The site includes, in both English and Spanish, information on state laws regarding abortion, and a listing of electronic and general resources. The information includes definitions of sexual organs, sexually transmitted diseases, and other issues related to sexuality that could be considered "indecent" or "patently offensive" according to particular community standards. The site is visited daily by more than 1,500 users from more than eighty countries. The Coalition also communicates via e-mail directly with minors, frankly answering questions about sexuality. Natasha Minsker is the *amicus* contact person for the Coalition.

Creative Coalition of Artists is a national Internet organization comprised of poets who place their works on an America OnLine ("AOL") page called the Poetry Corner. *See http://www.on-net.net/~cca/* (Exhibit 38). The poets within Creative Coalition use the Internet to share their poetry and to exchange critiques, suggestions and comments on it, as well as to enable others simply to enjoy reading it. Jordanne Holyoak is its media coordinator and *amicus* contact person.

Creative Coalition and its members are concerned that the CDA may prohibit certain writings from being placed on the Internet and that it will chill free expression. Their concern has particular force because, even prior to enactment of the CDA, AOL had removed dozens of poems from the Poetry Corner in

response to demands by some who believed that the use of such words as "breast" rendered a poem "indecent." Some poems were removed for no discernable reason whatsoever, making it impossible for their authors to understand what language had been considered "indecent" and therefore had to be avoided. Under the CDA, the poets of Creative Coalition face not only removal of their poetry by the service provider, but also the even harsher and more chilling threat of criminal prosecution by the federal government.

In light of the fact that some already have labeled poetry written by members of the Creative Coalition as "indecent" or "patently offensive" as measured by some unarticulated standards, the fear of prosecution experienced by its members is well founded. In the past, works of poetry such as those authored by the beat poets Allen Ginsburg and Jack Kerouac were deemed "indecent" and were banned in some communities during the 1950s and 1960s. The CDA poses a threat to those who post such works on the Internet, as well as to those who author or post newly composed poetical works that might be deemed "indecent" according to some community standards but which have artistic and social merit today and which may even become the classics of future generations.

Tri Dang Do is a student at Boston University School of Medicine. He authors a Web site that includes a page "prepared for and dedicated to the teens of East Boston" that provides education on sexually transmitted diseases (*http://med-www.bu.edu/people/sycamore/std/std.html*). *See* Exhibit 4. The information is strictly medical in nature, but presented in a way that teenagers will understand and with which they can identify. His goal is to help teens accessing the site to engage in healthy behavior and to teach them how to handle their sexuality in a safe and responsible manner, by arming them with factual information. He believes that it is vital that he perform this service and that teens accessing the Internet have a way of receiving this potentially live-saving information. He is concerned that the CDA poses a risk of prosecution to him for posting language that is essential to any discussion of sexually

transmitted diseases — their symptoms, prognoses, treatments or cures, and avoidance.

Feminists for Free Expression is an organization comprised of a diverse group of women who believe that freedom of expression is especially important for protecting and furthering women's rights. It maintains a Web site on which it describes these beliefs. *See http://www.well.com/user/freedom/* (Exhibit 39). It believes that the appropriate way to protect children from exposure to harmful materials on the Internet is increased parental responsibility and supervision, combined with advancing technology to aid parents in their efforts to protect their own children. *See id.* In addition to these beliefs, the organization's opposition to the CDA stems from a concern that it could be used to ban from the Internet works of art and literature that are expressions by women of their own sexuality, as well as materials that inform women and teenage girls about their own bodies. Similar materials in print form, such as the landmark book *Our Bodies, Ourselves,* have in the past been the targets of those who felt that they were "indecent" or "patently offensive," while failing to recognize or appreciate their tremendous educational value. Feminists for Free Expression has a reasonable concern that similar works transmitted on the Internet will be prohibited under the CDA.

Margarita Lacabe is a student at the Hastings School of Law who authors a Web site called **Derechos** that is devoted to encouraging human rights activism around the world by providing human rights information. *See http://www.derechos.org/derechos.html* (Exhibit 40). An active member of Amnesty International, Ms. Lacabe through her site provides links to Web sites maintained by that organization and other human rights organizations, and also publishes a Human Rights Newsletter available on its site. *Id.* Included on the site is a page excerpting personal accounts of torture, including sexual torture, contained in *Nunca Mas* (*Never Again*), the Report of the Argentine National Commission on the Disappearance of Persons, which covers the disappearance of 30,000 people in Argentina during the 1970s. While the accounts are graphic and might be deemed

to be "indecent" or "patently offensive" in some communities, Ms. Lacabe believes that it is the human suffering itself that is indecent, not the description of it. She believes that such descriptions are vital to informing people (including minors who have a right to know what is happening in their world) of human rights abuses, and to persuading people to fight these abuses. For placing this information on the Internet, where it is accessible to minors, Ms. Lacabe has a reasonable fear of prosecution under the CDA.

Lambda Legal Defense and Education Fund is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, and people with HIV/AIDS through litigation, education and public policy work. Lambda was founded in 1973 and brought the first AIDS discrimination lawsuit in 1983. Much of Lambda's litigation and advocacy work focuses on ensuring that lesbians and gay men can communicate openly about their sexual orientation without retribution, and on ensuring that all people — including young people — have access to accurate, understandable HIV prevention and treatment information.

Lambda uses the Internet to communicate with its clients and constituents, and to disseminate information about legal and policy issues related to sexual orientation or AIDS to lawyers and grassroots activists throughout the United States and abroad. Lambda's AIDS Project currently contributes to a Web site, *http://www.the body.com* (Exhibit 52), that is dedicated to providing a wide range of medical, social, political, and legal information of importance to people with HIV. Lambda is also in the process of designing its own Web site, through which it will attempt to reach gay youth with information about their rights and about resources that may help them deal with the isolation that so many gay and lesbian adolescents feel in homophobic family, school, or community environments. Lambda also uses the Internet to distribute press releases. For example, Lambda recently announced a favorable jury verdict and settlement in *Nabozny v. Podlesny*, a case involving the brutal anti-gay abuse of a teenager at the hands of his schoolmates, without any intervention by

school authorities. Even accurate descriptions of that abuse, which included a mock rape, could be deemed by some to fall within the CDA's censorship, as could much of the other information Lambda transmits and receives over the Internet.

Expression about topics related to sexuality, or about sex itself, has inherent value and should remain free from government interference on the Internet. The CDA jeopardizes Lambda's own postings on Web sites and ongoing use of the Internet to communicate with individuals across the country and internationally about gay- or HIV-related issues.

Maggie LaNoue authors a Web site called **NewsBoy**, which provides links to hundreds of world news sites on the Web. *See http://www.newsboy.com/* (Exhibit 41). The NewsBoy site allows users to go to news of state, national, and international news services online. It carries links to such nationally syndicated news sources as *Time* Magazine, *The Wall Street Journal*, ABC News, and CNN. There also are links to ElectNet, a site which carries election news in each of the fifty states, and to the U.S. Community Page Index out of Massachusetts, a network that itself links to over 1,000 American newspapers.

NewsBoy also carries links to such international news sources as the OneWorld News Service out of the United Kingdom and "Daily News: Just the Links," a Web site out of the Netherlands that links users to more than 200 media organizations worldwide. Many of the sites to which NewsBoy provides links have RealAudio clips. Ms. LaNoue plans in the future to add to NewsBoy additional features, including an index of news sources online in all fifty states, including state-by-state weather and sports.

The news sources to which NewsBoy provides links may include descriptions or depictions that some might deem "indecent" or "patently offensive," particularly depending upon the individual community standards to be applied. Ms. LaNoue can neither identify such material nor edit sources to delete such

material. The list of NewsBoy links is so extensive that she cannot even visit them all, let alone monitor them regularly. She is concerned that under the CDA she could be held responsible and criminally prosecuted for providing these links. The user-friendly NewsBoy site may no longer be able to provide this wealth of news access to computer users if the author may be held responsible for all the content of the links.

LoD Communications is an Internet service provider serving the Tallahassee, Florida region. It is concerned that the CDA makes it responsible for monitoring and removing communications by its customers, or Web sites that it carries, based on a vague, undefined, and overbroad standard of what is "indecent" or "patently offensive." Todd Lawrence is LoD Communications' *amicus* contact person.

Dr. Peter Ludlow is an Associate Professor in the Department of Philosophy at the State University of New York at Stony Brook. Included among the classes he teaches is a course entitled "Conceptual Issues in Cyberspace," which covers, in the online context, such philosophical issues as the nature of self and community. His practice is to place all of his course materials for the class on his home page, but the CDA has placed a chill on this teaching practice, and he has declined to place some of the more controversial materials online as a result. *See http://semlab2.sbs.sunysb.edu/Users/pludlow/highnoon.html* (Exhibit 42). He believes that under the CDA he may be prohibited from placing on that site materials relating to the nature of online sexual behavior in MUDs (multi-user interactive games played over the Internet) and other materials that are essential to the course but that may be termed "indecent" or "patently offensive." The teaching materials used for that course and located on the home page were published in book form last spring. *See High Noon on the Electronic Frontier: Conceptual Issues in Cyberspace* (MIT Press 1996).

Professor Ludlow also offered in the fall 1996 semester a course entitled "Moral Reasoning," which applied traditional concepts in moral reasoning to the ethical dilemmas that arise in

cyberspace. Included on the class syllabus were discussions of censorship on the Internet and the CDA itself. Professor Ludlow believes he cannot comprehensively or meaningfully teach these issues without giving examples of communications that might be "indecent" or "patently offensive" under the CDA but which nevertheless are worthwhile communications, and that he cannot do so without violating the CDA himself. Professor Ludlow was able to make available on the class web site most of the materials for the course, but felt unable to provide online copies of the more controversial materials, and made do by either merely alluding to their contents, or locating published hard copy versions of those materials.

Chuck More owns an art gallery in Philadelphia, Pennsylvania. He authors a Web site to display exhibitions of artwork sold at his gallery. *See http://www.libertynet.org~artst/more/* (Exhibit 43). The art displayed there regularly includes nudes, both painted and photographed. *See id.* Such artwork, displaying as it does sexual organs, could be considered "patently offensive" according to the standards of some communities, thus placing Mr. More in jeopardy of criminal prosecution.

Philadelphia Magazine is a general interest magazine published by **Metro Corp.** and operates its own Web site. It covers a broad range of issues of interest to the Greater Philadelphia area, some of which relate to medicine, art, literature, social affairs, politics, education, and sexual topics. For example, its March 1996 issue included a report on male prostitution in a Center City, Philadelphia neighborhood. Some material in that article might be within the CDA's scope if it were placed on magazine's Web site. *See* "The Vampires of Delancey Street," *Philadelphia Magazine*, March 1996, p. 64. The magazine also publishes classified advertisements, including personal advertisements by people seeking companions. *See id.* at 158. It places some of its editorial content and advertising online. *See http://www.phillymag.com/* (Exhibit 44). The magazine fears that it may not be able to engage in cyberspace publishing of some articles and advertising without risk of prosecution under the CDA.

PEN American Center ("PEN") is an organization of 2,400 novelists, poets, essayists, translators, playwrights and editors, chartered to defend free and open communication within all nations and across national boundaries. PEN has taken a leading role in attacking restrictive laws, rules, regulations, and practices that censor, curb or limit freedom of speech or expression in the nation.

Of all the restrictive practices that might censor an author's work and restrict freedom of speech, PEN American Center believes there is none more sweeping and dangerous than a prior restraint against publication. PEN and its members believe that the CDA has ominous implications for the entire craft of writing and publishing, which relies increasingly on the Internet for both information gathering and publishing.

PSINet, Inc. is a leading international provider of Internet access and value-added intranet, security, and web hosting services, with hundreds of points-of-presence throughout the United States and internationally through subsidiaries in Canada, the United Kingdom, and Japan, and through joint-venture partners in the Netherlands and South Korea. Founded in 1989, it is a publicly-traded company with offices in Virginia, New York, California, England, Canada, and Japan. PSINet provides Internet services to more than 18,000 businesses with approximately 2,500,000 individuals who access the PSINet network daily. PSINet also carries the traffic of some 25 smaller United States Internet service providers on a wholesale basis.

Because it does not want to censor its customers' Internet transmissions and because it firmly believes that its customers have a right of privacy in those transmissions, PSINet will not monitor its subscribers' communications or transmissions on the Internet. Moreover, despite its considerable technical sophistication, PSINet does not have the technical or logistical capability routinely to monitor and screen the millions of domestic and international transmissions of its customers and their customers and employees — not to mention the "blind" transmissions of other ISPs to whom the PSINet network is

linked — to determine whether any of those transmissions might be "indecent." The additional complications presented by the CDA's monitoring requirements with respect to the communications that PSINet carries from foreign points of origin and in foreign languages make the statute's defenses meaningless for PSINet.

Eric S. Raymond is the co-founder and a member of the Board of Chester County InterLink (CCIL), a volunteer-run nonprofit organization started in 1993 that provides community networking and Internet access for over two thousand users in Chester County, Pennsylvania. Its mission is to support access by poor, disadvantaged, elderly, and minority residents of Chester County who traditionally either have been financially unable, or lacked the background, education, and confidence, to take advantage of commercial Internet and computer bulletin board services. CCIL runs active community-outreach and educational programs designed to assist ordinary people in taking advantage of the new electronic media. *See http://www.ccil.org:80/~esr* (Exhibit 45).

Mr. Raymond believes that the CDA is a death warrant for CCIL. Under it, any person displeased by any of the content its users offer could find it all too easy to instigate prosecution of CCIL itself under the vague "indecency" language. CCIL does not command the resources needed to conduct the elaborate self-censorship required by the CDA's purported defenses, nor to defend itself against prosecution. The drain on CCIL's volunteer time required even to attempt to filter the entire Internet would cripple every educational and support program it runs. Moreover, Mr. Raymond fears that the CDA's overbroad indecency provisions effectively require content-based censorship and would prohibit CCIL from carrying information for teenagers on such issues as safe sex, AIDS prevention, abortion, or alternatives to abortion.

Don Rittner is the publisher of ***The MESH — Inside Cyberspace***, a Web version of a monthly magazine covering the Internet. *See http://www.themesh.com:80/meshinfo.html* (Exhibit

46). Since enactment of the CDA, Mr. Rittner has felt compelled to remove several columns from *The MESH* Web page out of fear of criminal prosecution. He believes that the CDA has limited his choice of content for his magazine, thus infringing on his First Amendment right to free expression. He further believes that it is unclear under the terms of the CDA precisely what speech he must remove or exclude to avoid prosecution and that, in order to reconcile this lack of clarity, he must take an overbroad view of materials that might be deemed "indecent" or "patently offensive."

The **Sexuality Information and Education Council of the United States (SIECUS)** is a national nonprofit organization incorporated in 1964 that develops, collects, disseminates, and promotes comprehensive information about sexuality, and advocates the rights of individuals to make responsible sexual choices. *See http://www.siecus.org/* (Exhibit 47). It believes that sexually explicit speech and visual materials are indispensable elements of sexuality education, and that the CDA may restrict the appropriate professional use of such materials by sexuality educators, therapists, and researchers. *See id.* Betsy Wacker is the *amicus* contact person for SIECUS.

Dr. Lloyd K. Stires is a social psychologist and professor in the Psychology Department at the Indiana University of Pennsylvania. His primary academic research deals with the content and effects of pornography. In the context of his work, he subscribes to several Internet discussion groups that sometimes involve frank discussions of human sexuality, as well as censorship issues and First Amendment rights. He also teaches an annual seminar at the university entitled "Pornography: Critical, Behavioral and Legal Approaches." He sends announcements regarding the seminar to students and also forwards to them information downloaded from the Internet that is relevant to the course and that could be deemed "indecent" or "patently offensive." He is concerned that this academic activity may expose him to prosecution under the CDA. Further, he is concerned that the CDA will chill his ability to conduct his research on the Internet, by forcing the removal of materials that

are "indecent" or "patently offensive" according to some community standards but which form a vital part of his studies and teaching.

Peter J. Swanson is a Ph.D. candidate in Electrical Engineering and Computer Science at the University of Michigan and a member of the University's Advanced Technology Laboratory. He authors a Web site that includes a page dedicated to a discussion of *United States v. Baker*, 890 F. Supp. 1375 (E.D. Mich. 1995). *See http://ai.eecs.umich.edu/people/pjswan/* (Exhibit 48).

The *Baker* case concerned a United States prosecution under 18 U.S.C. § 875(c) for threats transmitted via e-mail over the Internet, including stories written by the defendant, a student at the University of Michigan. The *Baker* Web page is typically accessed by scholars interested in the legal and social implications of the case and by students of philosophy and composition who use the case as a discussion topic. While the stories and e-mail messages themselves are unquestionably offensive, they are so central to an understanding of the case that the United States District Court for the Eastern District of Michigan quoted them extensively in its opinion dismissing the indictment. *See Baker*, 890 F. Supp. at 1387-90. The text of that opinion is reproduced on Mr. Swanson's Web page. *See* Exhibit 48. However, since enactment of the CDA, Mr. Swanson has felt compelled to remove from that page the full text of the stories, despite his conviction that it is important to the public interest for those interested in the controversy to understand its underpinnings. *See id.* Fear of the strong penalties imposed by the CDA also has forced him to refuse legitimate requests for the material by some who access the *Baker* page because he is unable to confirm the age of the requesters — a problem exacerbated by the fact that he is part of a university system attended by minors.

Kirsti Thomas is a Reference and Technical Services Librarian at Seattle Pacific University in Seattle, Washington. Users of the library include undergraduates (including many

under the age of 18), children of graduate students, faculty members and their children, and members of the outside community, including minors.

Ms. Thomas believes that the CDA has a serious detrimental effect on how she fulfills her duties as a librarian serving these varied constituencies. The Internet is a major reference source within the field of library science, on which Ms. Thomas relies heavily in providing the library's patrons with rapid access to current and sometimes controversial information. Ms. Thomas has a reasonable fear of prosecution under the CDA for simply fulfilling those duties. For example, by showing a 17-year old nursing student *online* information on AIDS prevention and safe sex education, using such sources as a Web site, mailing list, discussion groups, or even access to LEXIS/NEXIS, she could be transmitting "indecent" or "patently offensive" information to a minor. Ironically, Ms. Thomas may show identical materials located in print to the same student without any legal repercussions at all. She believes this contrast demonstrates that the CDA is not narrowly tailored to achieve the government's stated compelling interest of preventing minors from receiving "indecent" or "patently offensive" information.

Additionally, consistent with her academic concentration in German culture and civilization, Ms. Thomas maintains a home page that includes a link to the German weekly news magazine *Der Spiegel* (which is carried in print form in most major libraries in the United States). *See http://paul.spu.edu/~kst/art.html* (Exhibit 49). The covers of *Der Spiegel*, which appear on her home page, frequently show naked breasts, which, while not offensive to German sensibilities, is not generally accepted mainstream journalism in this country. She is concerned that under the CDA she could be prosecuted if a minor accesses her home page and views or links to *Der Spiegel*. Ms. Thomas also believes that the CDA deprives her of her First Amendment right to post artwork on her home page that some might find "indecent" or "patently offensive." *See id.*

Overriding these specific concerns is Ms. Thomas's belief as a librarian and an educator that the Internet is an international source of information that is unlike any medium known before and that possesses unlimited educational and social value.

Web Communications is a Web hosting service that provides a self-service online facility used by its customers to post Web sites on the Internet. *See http://www.webcom.com/* (Exhibit 50). It services more than 1650 Web sites, and that number grows daily. The driving purpose of Web Communications is its desire to make available at a grassroots level the positive social benefits of the free exchange of ideas and expression among individuals that the Internet makes possible.

Web Communications is concerned that if one of its customers places on the Internet a communication that could be deemed "indecent" or "patently offensive" and accordingly unlawful under the CDA, then it too could be in danger of prosecution. The large and growing number of Web Communications customers posting information on their Web sites makes monitoring of those sites impossible as a technical and financial matter. But under the CDA, if it were brought to the attention of Web Communications that one of its customers was placing "indecent" or "patently offensive" speech on the Internet, it would be Web Communications' responsibility to remove it. That burden imposed by the CDA is unworkable and runs counter to' mission to provide open access to the Internet. Web Communications believes this mission is protected under the First Amendment. Web Communications' president and *amicus* contact person is Chris Schefler.

Miryam Ehrlich Williamson is a freelance technical journalist who has written a medical book concerning a neurochemical disorder called fibromyalgia. She conducted all the research for the book on the Internet — the only means available to her for locating all the information she required. Over the Internet, she interviewed hundreds of people who have fibromyalgia to determine their concerns and opinions and to

discuss the as-yet unknown cause and cure for the disorder. In the course of this research, she participated in discussions on the Internet that included references to bowel movements, menstruation, urinary tract infections, sexual relations, and contraception. These discussions included use of specific terminology and descriptions that were sometimes graphic but always central to the symptoms of the disorder and the struggle to live with it. Ms. Williamson believes that some might consider the discussions "indecent."

Under the CDA, research of the sort that Ms. Williamson conducted may now be impossible. The threat of prosecution posed by the CDA prohibits her from conducting unfettered follow-up interviews on fibromyalgia and from conducting research on that or similar medical disorders or diseases that might implicate "sexual or excretory activities or organs" and that might include communications considered by some to be "indecent" because other authors of speech on the Internet that she would need to access may themselves be chilled by the threat of prosecution. Ms. Williamson has written an essay posted on the Internet regarding the restrictions that the CDA has placed on her work. *See http://www.privatel.com/democracy24/essay/wmson.html/* (Exhibit 51).

(13)

Supreme Court, U.S.
FILED
FEB 20 1997
CLERK

No. 96-511

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Appellants-Defendants,

vs.

AMERICAN CIVIL LIBERTIES UNION, ET AL.,

Appellees-Plaintiffs.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF *AMICUS CURIAE* OF THE SPEECH COMMUNICATION ASSOCIATION IN SUPPORT OF APPELLEES-PLAINTIFFS

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF *AMICUS CURIAE* OF THE SPEECH COMMUNICATION ASSOCIATION IN SUPPORT OF APPELLEES-PLAINTIFFS

All parties to this appeal have consented to submission of this *amicus* brief, and their written consents have been filed with the clerk of the Court.

INTEREST OF *AMICUS CURIAE*

The Speech Communication Association ("SCA") is the oldest and largest organization in the United States involved in research, scholarship and teaching within the communication disciplines. The SCA's membership includes over 7100 individuals and 350 academic institutions, encompassing every state in the United States and 26 other countries. The SCA publishes six scholarly journals -- *The Quarterly*

Journal of Speech, Communication Monographs, The Journal of Applied Communication Research, Critical Studies in Mass Communication, Text and Performance Quarterly, and *Communication Education* -- as well as books related to the discipline's research and serial publications aimed at academics and teachers. Founded in 1914, the SCA has evolved into the principal professional organization for scholars, teachers, practitioners and critics of human communication.

The non-profit SCA has a long-standing policy not to engage in political lobbying activities. It is primarily a scholarly and academic organization whose membership spans the political spectrum. However, the SCA is in a unique position to offer a perspective on the technologies of computer-mediated communication. The SCA, as well as its individual members, have extensively studied how people use messages to generate meaning within and across various contexts, cultures, channels and media. The SCA has been at the forefront of research concerning communication in cyberspace, and in studying the attendant effects of this technology upon society. As such, the SCA's perspective may enhance the Court's review of the manner and degree to which the CDA restricts human communication.

SUMMARY OF ARGUMENT

As the leading academic organization engaged in research and scholarship of human communications, the SCA submits this brief in order to assist the Court's evaluation of whether the CDA is the "least restrictive means" of achieving Congress' goals.

Two facts distinguish the media targeted by the CDA from the communications media at issue in previous cases. First, the Internet and related forms of computer-mediated communication provide individuals and small organizations with the unprecedented ability to participate in communication processes more actively than ever before possible. And second, these new technologies have an extraordinary and unique ability to create and facilitate ongoing, back-and-forth discourse and debate.

In these respects, the Internet and computer-mediated communications represent a fundamental break from earlier methods of electronic communication. The "broadcast" model of communication, in which a limited number of centralized speakers transmit static content to recipients is simply inapplicable to this new media. Instead, computer-mediated communications represent the next step in the evolution of electronic communication. Participants can react and respond to the communications of others by creating and distributing their own communications that comment upon, criticize or build upon the earlier communications. These actions, and the ongoing discourse they create, can occur spontaneously and inexpensively. As a result, for the first time, almost any citizen can interact and engage in discourse instantaneously with hundreds or thousands of other citizens and debate the issues of the day.

These aspects of computer-mediated communication have a profound constitutional significance. The Framers conceived of the First Amendment as a means to facilitate the ability of citizens to debate issues of public concern. Participatory citizen discourse on matters of public interest lies at the very core of the First Amendment. Thus, in analyzing the constitutionality of the CDA, the Court must consider the degree to which the CDA restricts actual discourse among citizens.

In drafting the CDA, the government simply imported regulations developed in the context of broadcast media and similar technologies. However, the computer-mediated communications targeted by the CDA implicate somewhat different constitutional values than those implicated by earlier media. The Court's previous review of indecency regulations concerning broadcast media and cable TV did not require extensive consideration of the effect of those regulations upon actual back-and-forth discourse and debate, nor did those cases implicate the ability of individual citizens to disseminate their constitutionally-protected expression to the public at large.

Here, the CDA unnecessarily and severely restricts the ability of individual citizens to participate in the discourse so essential to the Framers' conception of the First Amendment. As a result, the CDA cannot survive strict scrutiny.

ARGUMENT

THE CDA SUBSTANTIALLY AND UNNECESSARILY RESTRICTS TWO CORE FIRST AMENDMENT VALUES: CITIZEN PARTICIPATION AND BACK-AND-FORTH INTERACTIVE DISCOURSE

A. The Participatory And Interactive Nature Of Computer-Mediated Communication Represents The Next Step In The Evolution Of Electronic Communication

The computer-mediated communications at issue in this suit differ *qualitatively* from the media at issue in the indecency cases relied upon in the Government's brief. These qualitative differences do more than merely distinguish *Pacifica*, *Sable*, *Denver Area* and similar cases, and require a careful examination of the CDA's effect on core First Amendment values.

Computer-mediated communications represent two vitally important technological and societal developments. For the first time, each citizen partially has the ability to communicate his or her views directly, simultaneously and nearly instantaneously to millions upon millions of other citizens. Moreover, computer-mediated communications encourage discourse -- that is, back-and-forth multilateral communications -- to a far greater extent than previous methods of mass communication.

As the district court discussed in detail, the new technologies of e-mail, listservs, newsgroups and the World Wide Web provide tens of millions of computer users with a variety of inexpensive and easily accessible methods to engage in communication with a large group of people who would otherwise be unreachable. J.S. App. 16a-32a ¶¶ 12-48, *ACLU v. Reno,* 929 F. Supp. 824, 832-38 (E.D. Pa. 1996). Participants

can rapidly combine text, graphics, audio and video elements into a single message, and then exchange their messages spontaneously with thousands of other participants, all without the mediation or editorial discretion of centralized authorities. Each of these facts empowers individuals and small organizations and stimulates rapid back-and-forth discourse. The broadcast model of mass communication, in which citizens merely have access to information provided by a relatively small number of large, centralized media entities, simply does not apply to this new technology. *See* J.S. App. 44a-46a, 929 F. Supp at 843-44.

These technologies represent a return to the Framers' underlying conception of the First Amendment. To the Framers, the expression of individual citizens had paramount significance for the First Amendment, and formed an essential element of our constitutional system:

> When the Framers thought of the press, they did not envision the large, corporate newspaper and television establishments of our modern world. Instead, they employed the term "the press" to refer to the many independent printers who circulated small newspapers or published a writer's pamphlets for a fee. It was in this form . . . that much of the most important and characteristic writing of the American Revolution occurred.

McIntyre v. Ohio Elections Commission, 514 U.S. __, 131 L. Ed. 2d 426, 448 (1995) (Thomas, J., concurring) (citations and internal quotations omitted); *see also Lovell v. City of Griffin,* 303 U.S. 444, 452 (1938). The Framers intended the First Amendment's protection of "the freedom of speech, and of the press" to guarantee and stimulate discourse among the citizenry, and not merely to protect the editorial judgments of the media. As stated in Judge Cooley's early treatise on constitutional law:

> The evils to be prevented [by the First Amendment] were not the censorship of the press merely, but any action of the government by means of which it

> might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.

Thomas McIntyre Cooley, 2 *Constitutional Limitations,* at 886 (8th ed. 1927).

Despite the Framers' concern that the First Amendment function as a means for a broad spectrum of citizens and organizations to participate in public dialogue, in recent years technological and economic realities have made it difficult, if not impossible, for individuals to share their messages with large segments of society. In *Miami Herald*, for example, the Court restated many of the arguments regarding the historical trend towards the concentration of media ownership into the hands of a few entities:

> [T]he press of today is in reality very different from that known in the early years of our national existence. . . . Newspapers have become big business, and there are far fewer of them to serve a larger literate population. Chains of newspapers, national newspapers, national wire and news services, and one-newspaper towns are the dominant features of a press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events. . . .
>
> The elimination of competing newspapers in most of our large cities, and the concentration of control of media that results from the only newspaper's being owned by the same interests which own a television station and a radio station, are important components of this trend toward concentration of control of outlets to inform the public.
>
> The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion.

Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 248-50 (1974); *see generally* Jerome Barron, *Access To The Press -- A New First Amendment Right*, 80 Harvard L. Rev. 1641, 1643 (1967) ("[A] comparatively few private hands are in a position to determine not only the content of information but its very availability").

The intervening decades since *Miami Herald* have only exacerbated the concentration of media power in the hands of a few large entities. In 1995, only 1,710 daily newspapers and 513 weekly periodicals were published in the U.S.[1] Most daily newspapers are owned by large chains.[2] During 1992, only 49,276 new books were published in the U.S.[3] In broadcasting, only 1,145 licensed commercial television broadcasting stations, 5,109 commercial FM radio stations, and 4,913 commercial AM radio stations were in operation within the U.S. during 1994.[4] Broadcasting has followed the model of newspapers, and is experiencing enormous consolidation of ownership of local radio and TV stations into the hands of a few large companies.[5] In the cable realm, in which the cable

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[1] *See* U.S. Dep't Of Commerce, *1995 Statistical Abstract Of The United States*, at 579 (Table No. 917). In 1900, in contrast, over 2,226 daily newspapers and 1,493 weekly periodicals were published in the U.S. *See* U.S. Dep't Of Commerce, *Historical Statistics Of The United States: Colonial Times To 1970*, at 809 (Table Nos. R224-R231).

[2] By 1986, the five largest newspaper chains controlled 27% of daily newspaper circulation in the U.S., while only 23% of newspapers remained independent. Lucas Powe, *The Fourth Estate And The Constitution,* at 202 (1991). "Chain" ownership of newspapers was virtually nonexistent in 1900. *Id.*

[3] U.S. Dep't Of Commerce, *1995 Statistical Abstract Of The United States*, at 580 (Table No. 921). This total includes both entirely new works and new editions of previously published books.

[4] U.S. Dep't Of Commerce, *1995 Statistical Abstract of the United States*, at 571 (Table No. 897).

[5] During 1996, there were over 1,115 mergers and acquisitions involving TV and radio stations, representing $25.362 billion in transactions. *Special Report: 1996 Station and Cable Trading,* Broadcasting & Cable Magazine, at 19 (Feb. 3, 1997). The Telecommunications Act of 1996

(Footnote continued)

provider generally has a local monopoly, six companies control 60% of American cable households.[6]

This is not to say that there is anything inherently wrong with consolidation in the mass media. However, the Court has previously acknowledged some of the special advantages that corporations,[7] public officials and public figures enjoy in public discourse, and some of the institutional disadvantages faced by individuals.[8] As a practical matter, individual citizens have largely been prevented from participating in mass communications. Most public discourse in America has therefore been conducted through media "proxies." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389 (1969) (describing "proxy" role of broadcasters in public debate); *see Turner Broad. Sys., Inc. v. FCC*, 512 U.S. __, 129 L. Ed. 2d 497, 526-27 (1994) (noting "gatekeeper" role of cable operators in controlling content of public debate).

However, the computer-mediated communications targeted by the CDA represent a fundamental break with previous forms of mass media. No longer must the First Amendment take into account the concepts of "proxies" and "gatekeepers" for public discourse or "limited spectrum space." Instead, these new technologies permit free speech doctrine to return

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eliminated many previous limitations on broadcast ownership and made it far easier for large media conglomerates to purchase previously-independent radio and television stations.

[6] *Warren Publishing's 1996 Cable And Station Coverage Atlas*, at 4-5 (1996).

[7] *See Austin v. Michigan Chamber Of Commerce*, 494 U.S. 652, 659 (1990) (noting ability of corporations to "use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace"); *Austin*, 494 U.S. at 691 (Scalia, J., dissenting) (noting that media corporations have more opportunity and power to distort public debate and corrupt political process than non-media defendants).

[8] *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-45 (1974) ("Public officials and public figures usually enjoy significantly greater access to the channels of effective communication . . . than private individuals").

to the Framers' original conception of the First Amendment as a means to ensure and facilitate the ability of individual citizens to express their views to other citizens.

In addition to providing individual citizens with the means of mass communication, computer-mediated communications share a second quality distinguishing them from previous forms of media. Newsgroups, listservs and Web sites all stimulate back-and-forth multilateral discourse and dialogue to an extent never before seen. Newsgroups and listservs, for example, are "open discussions and exchanges on particular topics." J.S. App. 23a-24a ¶ 25, 929 F. Supp. at 834. Similarly, the "hyperlinks" between Web sites permit one Web site to comment upon, criticize or develop information contained on another Web site, creating a single fluid and interconnected body of discourse. *See* J.S. App. 25a-32a ¶¶ 33-48, 929 F. Supp. at 836-38. In these respects, the Internet has evolved in much the same way as the Court described the evolution of universities, as "voluntary and spontaneous assemblages or concourses for [citizens] to speak and to write and to learn." *Rosenberger v. University of Virginia*, 515 U.S. __, 132 L. Ed. 2d 700, 719 (1995).

Communication scholars have long acknowledged the qualitative distinction between modes of unilateral communication (such as the broadcast media) and modes of multilateral communication (such as the telephone and computer-mediated communications). The term "communication" has its roots in "communiatus," which is the Latin word for "sharing" and originates in the early Catholic tradition of sharing the Sacrament of the Holy Eucharist. Communication scholars generally define "communication" as ways in which meaning is shared between individuals or among a community. *See* Jamieson & Campbell, *The Interplay of Influence*, at 3 (1997); Rudolf Verderber, *Communicate*, at 4 (1987). Technologies used to communicate can either enhance or inhibit the ability to share meaning. Broadcast media, for example, can provide a message to a large number of people at once, but provide the broadcaster with only limited ability to share and understand the meaning received by the audience. The

telephone, in contrast, extends face-to-face communication in that immediate reactions to what is said will change the nature of what is said subsequently.

Computer-mediated communications represent the next evolutionary step in communications technology, extending the discourse of telephone communication, rather than that of the more static model of broadcast communication. Even though information is available to be accessed by a large number of people, the receivers of that information now have means to provide immediate reactions to the providers of the information. For example, if one accesses information or opinions that one finds offensive, or if one has additional information, opinions or context to add to the original information, one can so communicate to the person who provided the information as well as to the others who have accessed the original information. The originator of the information also has the ability to communicate directly in return. This type of multilateral, reciprocal communication creates a transactional process of sharing meaning and generates the dialogue and discourse so essential to the Framers' conception of the First Amendment.

In computer-mediated communication, messages tend to engender a great deal of direct interchange. Once an initial message has been sent and its meaning shared by others, discourse develops that can lead in many directions before the discussion is done. *See* Shank and Cunningham, "Mediated Phosphor Dots" in *Ess' Philosophical Perspectives on Computer-Mediated Communication*, at 30 (1996). Everyone interested in the message can jump in and add a voice to debate, challenge, change, reject or extend the original message. New discussions may spring forth, and other topics may be added. Discourse begets discussion and greater discourse -- and potentially, resolution. The end result is very close to the ideal of the marketplace of ideas envisioned by Justice Holmes. *See Abrams v. United States* 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting); *see also* Fraleigh and Tuman, *Freedom Of Speech In The Marketplace Of Ideas*, at 397 (1997). Moreover, discourse itself creates community though not in

the traditional sense of communities created by geographic boundaries. Instead, the ebb and flow of discourse allows Internet users to form communities around common interests, interact while they find such interaction to be valuable, and then disperse.

First Amendment principles recognize that participatory, multilateral discourse has a special constitutional significance. Multilateral debate and discourse are the very core of the First Amendment, which embodies a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964). As Professor Chafee has noted, there are many ambiguities in determining what the Framers intended the First Amendment to mean, but there "can be no doubt" that their conception encompassed an unrestricted right to engage in free discussion and debate on matters of public interest. Zechariah Chafee, *Free Speech In The United States,* at 19 (1941). Even if the debate touches upon controversial topics, the very fact that back-and-forth discourse is taking place serves the purposes of the First Amendment: "Any word spoken . . . that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom -- this kind of openness -- that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this . . . often disputatious society." *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 508-09 (1969).

The Court has acknowledged that encouraging dialogue and discourse presents a constitutionally significant value completely separate from a speaker's right to speak. *See Board of Education v. Pico*, 457 U.S. 853, 866 (1982) ("Our precedents have focused not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas") (*quoting First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978));

Pacific Gas & Elec. Co. v. California Public Utilities Comm'n, 475 U.S. 1, 8 (1986) ("The constitutional guarantee of free speech serves significant societal interests wholly apart from the speaker's interest in self-expression. By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information").

As discussed in more detail in Section B of this *amicus* brief, and in the briefs of the ACLU and ALA appellees, the CDA substantially restricts this multilateral discourse. Computer-mediated communication is *interactive* in a way and on a level not approached by past technologies, including the telephone. Moreover, the discourse so characteristic of the Internet distinguishes this medium from the unilateral communications at issue in *Pacifica* and *Sable*.[9] In these prior cases, the Court needed to address only one aspect of the First Amendment -- a speaker's right to speak and a citizen's right to receive that speaker's message. Here, however, a somewhat different constitutional value is involved -- the creation and facilitation of public discourse, and the right of the public to participate in this discussion without unnecessary government restrictions. *Sable,* for example, involved pre-recorded, for-profit dial-in services that provided only one-way messages to purchasers. *Sable Communications v. FCC*, 492 U.S. 115, 117-18 (1989). These dial-in recordings provided none of the debate or dialogue present in Usenet newsgroups, e-mail, listserv mailing lists, or even Web sites. Similarly, radio and TV broadcasting and cable TV all involve unilateral communication from programmers to recipients whose role is essentially limited to choosing whether or not to access the programming. In *Denver Area*, for example, the Court distinguished

[9] The Court has previously rejected governmental attempts to use the rationale developed in the broadcasting context to regulate expression in other forms of media not subject to broadcasting's technological limitations. *See Pacific Gas & Elec. Co. v. California Public Utilities Comm'n*, 475 U.S. 1, 10 n.6 (1986) (*citing Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 543 (1980)).

cable subscribers, programmers and cable operators as three separate and distinct groups. *See Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. __, 135 L. Ed. 2d 888 (1996). The Court discussed subscribers solely as accessors of programming and discussed cable operators as those who provide, select and deliver individual programs. Because there was essentially no immediate interaction between these groups, there was no need to address the degree to which the statute restricted back-and-forth discourse.

Internet participants, in contrast to the audiences for cable TV and broadcast media, are not merely passive accessors of information provided by others. In fact, Congress determined that the Internet constitutes a fundamental departure in the nature of public debate, and codified this determination as part of the statute:

> (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and information resources to our citizens.
>
> (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
>
> (3) The Internet and other interactive computer services *offer a forum for a true diversity of political discourse,* unique opportunities for cultural development, and myriad avenues for intellectual activity.

CDA § 509, *codified at* 47 U.S.C. § 230(a) (emphasis added).

Despite Congress' unambiguous recognition of the Internet's unique ability to stimulate true multilateral debate, the Government fails to address the CDA's inhibiting effect upon discourse. Instead, the Government focuses only upon

whether consumers still have a reasonable opportunity to obtain commercial pornography. *See* Gov't Brief at 19, 28, 39-40. The Government simply does not address, nor did Congress seriously consider, the CDA's effect on back-and-forth multilateral discourse.

B. The CDA Unnecessarily Restricts Participation By Individual Citizens In Interactive Debate And Discourse

The severe criminal penalties of the CDA will have their greatest effect on the most revolutionary aspects of the Internet: the participation of ordinary citizens and the Internet's role as a forum for spontaneous, unmediated back-and-forth discourse. Requiring participants to perform credit card checks, obtain adult access codes, or "tag" their messages before daring to communicate with fellow users will completely transform this new medium. Because Congress imported the CDA's restrictions from the unilateral broadcast model of communication, the CDA will force the Internet to fundamentally transform its fluid, participatory multilateral nature in order to fit within the more static model of broadcast media.

The CDA creates substantial barriers to individuals who wish to participate in discourse on the Internet. As the district court found, and as discussed in the ACLU and ALA's briefs, the CDA's requirements of credit card checks and adult access codes will financially burden users. J.S. App. 53a-56a ¶¶ 97-107, 929 F. Supp. at 846-47. The Court has already held that imposing additional financial costs upon a speaker constitutes a "penalty on the basis of the content," and inevitably leads speakers to avoid controversial topics, thereby "dampen[ing] the vigor and limit[ing] the variety of public debate." *Miami Herald*, 418 U.S. at 256-57; *see Rosenberger*, 515 U.S. at __, 132 L. Ed. 2d at 715 ("the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression") (*citing Simon & Schuster, Inc. v. Members Of N.Y. State Crime Victims Board*, 502 U.S. 105, 115 (1991)).

The CDA's "tagging" requirement presents additional concerns. As the district court found, tagging does not currently exist, and would require several developments before becoming a reality. J.S. App. 56a-58a ¶¶ 108-16, 929 F. Supp at 847-48. And as discussed in the ACLU and ALA's briefs, the CDA's vague concept of "indecency" provides insufficient guidance for any workable tagging system. Moreover, by requiring ordinary citizens to categorize and label their speech before participating in public discourse, the CDA burdens those speakers merely because they have chosen to communicate on controversial topics. *See e.g., Rosenberger*, 515 U.S. at __, 132 L. Ed. 2d at 719; *McIntyre v. Ohio Elections Commission*, 514 U.S. __, 131 L. Ed. 2d 426, 441-42 (1995); *see also Interstate Circuit, Inc. v. City Of Dallas*, 390 U.S. 676 (1968). Tagging, credit card checks and adult-ID requirements also impose administrative and recordkeeping burdens that are themselves constitutionally suspect. *See e.g., Austin v. Michigan Chamber Of Commerce*, 494 U.S. 652, 658 (1990) (recordkeeping and administrative requirements burdened expressive activity).

After carefully evaluating the particular technologies at issue, the district court concluded that credit card verification, adult access codes, and adult personal identification numbers are effectively unavailable for non-commercial, not-for-profit entities. J.S. App. 61a ¶ 122, 929 F. Supp. at 849. As a result, the CDA will prevent these entities (which obviously include most individual citizens) from participating in discourse on the Internet. Ultimately, the threat of imprisonment and the burden and expense of credit card checks, adult-access verification procedures and "tagging" will force ordinary citizens[10] and small, non-commercial entities from communicating on topics that might conceivably be considered to fall within the vague concept of "indecency." *See Miami Herald*, 418 U.S. at 256-58 (right-of-reply requirement would deter newspapers from speaking out in the first instance); *Pacific Gas*, 475 U.S.

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[10] Because individual citizens, but not corporate entities, can be imprisoned, the CDA discourages individuals from participating.

at 10 (discussing *Miami Herald*). In contrast, the alternatives set forth in the district court's opinion will have a much less restrictive effect upon both back-and-forth discourse and upon citizen participation in such discourse.

More fundamentally, the CDA seeks to transform the nature of communication on the Internet. Congress based the CDA's regulations on the more static model of communication derived from broadcast cases such as *Pacifica*. As such, the CDA simply ignores the multilateral, fluid and participatory model of communication applicable to the Internet. The CDA's burdens will only work if: (1) Internet participants have only a small number of previously-prepared messages to communicate; (2) Internet participants can evaluate the content and context of their messages in advance in order to determine whether they may be indecent; and (3) Internet participants have the time and resources to identify and prescreen the recipients of each of their communications. These assumptions, while appropriate for the broadcast model of communication, are inapplicable to the rapid interaction that characterizes more fluid models of communication.

Each of the burdens imposed by the CDA substantially reduces the Internet's ability to provide spontaneous back-and-forth discourse. These burdens are premised upon the notion that a few central authorities who have the resources to comply with the CDA will transmit static, predetermined, and generally pre-recorded messages to passive recipients. Performing credit card checks or requiring adult access codes from the recipients of communications are inconsistent with the spontaneous back-and-forth flow of discourse. These requirements will particularly inhibit the rapid flow of dialogue when applied to newsgroups, Internet relay chat, listservs, and similar forums for discussion.

The government's brief fails even to consider the CDA's effect on interactive discourse. Instead, the government considers only one aspect of the CDA's restrictiveness, namely whether the CDA leaves open reasonable opportunities to disseminate and receive indecent material. *See* Gov't Brief at 19,

28, 39-40. However, analysis of the restrictiveness of the CDA requires consideration of the CDA's effect on two additional values that lie at the core of the First Amendment, namely, how the CDA restricts discourse, and how the CDA restricts the ability of citizens to participate in this ongoing discourse. The government fails to address these issues for the simple reason that Congress did not seriously consider the CDA's effect on these constitutional values. Congress' entire approach to drafting the CDA, and the government's argument on this appeal, are both premised on an inapplicable model of communication.

The district court examined several effective alternatives to the CDA that place control in the hands of the recipients of communications that are less restrictive than the CDA. J.S. App. 23a-42a ¶¶ 40-73, 929 F. Supp. at 838-43. Editorial decisions made by the recipient of a communication have a far less inhibiting effect upon discourse than do governmental requirements that restrict the sender's ability to reach an audience. *Compare Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970) *with Lamont v. Postmaster General*, 381 U.S. 301 (1965). Here, the criminal penalties of the CDA, and the financial and other burdens imposed by its affirmative defenses, will severely restrict the spontaneous discussions and broad citizen participation so characteristic of computer-mediated communications. Because less restrictive alternatives exist that will achieve Congress' objectives, the CDA cannot survive strict scrutiny.

CONCLUSION

Computer-mediated communication presents an ideal medium for the free exchange of ideas and messages by ordinary citizens, and creates an unprecedented forum for on-going discourse across a wide a variety of subject matter (from polemic and political to personal, from commercial to academic). This exchange of views and expression by the public lies at the very core of the First Amendment.

Congress enacted the CDA with little, if any, consideration of the CDA's effect upon the spontaneous, interactive discourse so essential to the First Amendment. Instead, Congress simply imported regulations developed in the context of qualitatively different media. These regulations have a much more substantial effect on citizen discourse when applied to computer-mediated communications than these regulations have in the context of previous forms of electronic media.

The exciting new technology of computer-mediated communications should be permitted to flourish, as it has in the past, as a unique and empowering marketplace for ordinary citizens to form electronic communities by sharing meaning with one another.

Respectfully submitted,

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No. 96-511

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

OCTOBER TERM, 1996

JANET RENO, Attorney General
of the United States, *et al.*,

Appellants,

v.

AMERICAN CIVIL LIBERTIES UNION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF *AMICUS CURIAE* OF VOLUNTEER LAWYERS FOR THE ARTS, VARIOUS ARTISTS AND ART ORGANIZATIONS IN SUPPORT OF APPELLEES

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Interest of *Amici*

Amici Robert Altman, Laurie Anderson, Jon Robin Baitz, Eric Bogosian, Robert Beaser, John Corigliano, David Del Tredici, Karen Finley, Timothy Greenfield-Sanders, Emily Hartzell and Nina Sobell a/k/a "Parkbench," Jenny Holzer, Tony Kushner, Craig Lucas, Philip Pearlstein, Lou Reed, Cindy Sherman, Kevin Smith, Ann Sperry and Oliver Stone are renowned artists whose work represents visual, musical and literary expression exemplifying many of the major artistic movements in the United States today. Examples of the artistic works of some of these *amici* are currently available for viewing, reading or listening through various "sites" on the World Wide Web and the Internet.[1] *Amicus* The New Museum of Contemporary Art is among the major not-for-profit and educational institutions and museums in the United States devoted to the collection, preservation and display of visual art; many of these institutions maintain "sites" on the Internet through which artistic images and other communications in their collections can be viewed, read or heard. *Amici* Metro Pictures, New York and Ronald Feldman Fine Arts Inc. are commercial art galleries engaged in the display and sale of creative artworks. *Amicus* Theatre Communications Group is a national organization devoted to American theater arts, with over 17,000 members. *Amici* Volunteer Lawyers for the Arts, Albany/Schenectady League of Arts, Inc., California Lawyers for the Arts, Colorado Lawyers for the Arts, Connecticut Lawyers for the Arts, Maine Volunteer Lawyers for the Arts, Maryland Lawyers for the Arts, St. Louis Volunteer Lawyers and Accountants for the Arts, Volunteer

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1. These defined terms have the meanings used in the opinion below. *American Civil Liberties Union v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996) ("*ACLU*").

Lawyers for the Arts, D.C., and Volunteer Lawyers for the Arts of Massachusetts, Inc. are not-for-profit organizations providing legal services to artists and arts organizations with limited financial resources.

Amici urge the Court to affirm the decision of the three-judge district court in the Eastern District of Pennsylvania preliminarily enjoining appellants from enforcing, prosecuting, investigating or reviewing any matter premised upon Sections 223(a)(1)(B) and 223(a)(2) of the Communications Decency Act of 1996 (the "CDA"), to the extent such actions are based upon the alleged creation, display or transmission of materials other than obscenity or child pornography, and Sections 223(d)(1) and 223(d)(2) of the CDA. *Amici* submit this brief to stress the vital importance of public availability of artistic works, whose exhibitors are now subject to criminal prosecution under the CDA's prohibitions on the creation, display or transmission to minors via the Internet of "indecent" or "patently offensive" material.

Statement of the Case

The CDA criminalizes, *inter alia*, the creation and display or transmission of "images or other communications" which may be deemed "indecent" or "patently offensive" for minors, defined as persons under the age of eighteen. *See* 47 U.S.C. §§223(a)(1)(B), (a)(2); 223(d)(1), (d)(2).[2] The three-

2. Section 223(a)(1)(B) ("the indecency provision") provides in part that any person in interstate or foreign communications who, "by means of a telecommunications device," "knowingly . . . makes, creates, or solicits" and "initiates the transmission" of "any comment, request, suggestion, proposal, image or other communication which is obscene or *indecent*, knowing that the recipient of the communication is under 18 years of age," shall be criminally fined or imprisoned. (Emphasis added.)

(Footnote continued on next page)

judge district court below, convened pursuant to Section 561(a) of the CDA and 28 U.S.C. §2284, preliminarily enjoined appellants from enforcing these provisions of the CDA as unconstitutional on their face. *ACLU*, 929 F. Supp. at 883-84.

The Court has jurisdiction over the Government's appeal pursuant to Section 561(b) of the CDA.

Summary of Argument

1. The Court has long recognized that artistic expression is as entitled to protection under the First Amendment as classic political or written "speech." The communication and exchange of ideas, expressed and received through a myriad of visual images, text and aural communications, is not limited to the spoken or typewritten word. Few speeches on the evils of war can surpass, for example, the shattering folly depicted in Picasso's *Guernica*; few tracts on human beauty do not pale next to Michelangelo's statue of the nude *David* (Exhibit A-1).

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Section 223(d)(1) ("the patently offensive provision"), makes it a crime to use an "interactive computer service" to "send" or "display in a manner available" to a person under age 18, "any comment, request, suggestion, proposal, image, or other communication that, *in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs*, regardless of whether the user of such service placed the call or initiated the communication." (Emphasis added.)

Sections 223(a)(2) and 223(d)(2) make it a crime for anyone to "knowingly permit[] any telecommunications facility under [his or her] control to be used for an[y] activity prohibited" in Sections 223(a)(1)(B) and 223(d)(1), and impose a punishment of a fine, up to two years imprisonment, or both for each offense.

2. The Internet is truly "the most participatory form of mass speech yet developed." *ACLU*, 929 F. Supp. at 883. By enabling for the first time the worldwide, instantaneous and nearly cost-free transmission of images, sound and text, the Internet substantially reduces many of the practical obstacles to widespread access to creative works. DaVinci's *Mona Lisa* no longer looks down only upon those privileged enough to enjoy a Parisian vacation; through the remarkable vehicle of the Internet, she now casts her smile simultaneously from Addis Ababa to Zanzibar. The Internet is also the first mass medium in which art need not be static: many new artistic creations available on the Internet are evolving products of audience response and participation, a worldwide give-and-take of unprecedented scope and creativity.

3. While *amici* do not quarrel with the CDA to the extent that it covers hard-core obscenity or child pornography, which were already proscribed before the CDA's adoption,[3] the CDA's prohibitions on the creation, display or transmission of "indecent" and "patently offensive" images and communications on the Internet unconstitutionally burden the creation and dissemination of art. By proscribing an amorphous array of constitutionally protected speech in a manner which is not narrowly tailored to advance the Government's compelling interest in protecting minors, the CDA sweeps so broadly and vaguely as to act as a virtual ban on a substantial amount of artistic expression, violating the constitutional rights of both adults and minors to receive and transmit such speech.

4. The "safe harbor" provision of Section 223(e) of the CDA makes available to content providers on the Internet the

3. 18 U.S.C. §§1464-65 (criminalizing obscene material); *id.* §§2251-52 (criminalizing child pornography).

potential defenses of debit and credit card verification, adult verification by password or adult personal identification number, or labeling-and-blocking of "indecent" or "patently offensive" material. While *amici* do not oppose an effective, narrowly-tailored method of restricting access by minors to limited types of these materials, the methodology described in Section 223(e) is presently "effectively unavailable for non-commercial, not-for-profit entities," *ACLU*, 929 F. Supp. at 849, and thus acts effectively as a ban on the creation and display or transmission of artistic works protected by the First Amendment.

Argument

I. ARTISTIC EXPRESSION IS ENTITLED TO THE FULL PROTECTION OF THE FIRST AMENDMENT

The artistic impulse is as old and widespread as humankind itself. From the Paleolithic cave paintings of southwest France, to the ancient ritual songs of Africa, to classical Greek drama and sculpture, to the "hip-hop" music of today's inner-city youth, human beings have always sought to express themselves through visual, aural and textual works of the imagination. Through the creation and display of their work, artists endeavor to communicate with others and affect the world around them. Some art is connected to religion or magic: the cave paintings of our ancestors, the depictions of Madonna and Child produced in the Renaissance (Exhibit A-2), and the Bharata Natyam dance of India are but a few examples. Sexual symbols, in the form of phallic sculptures (Exhibit A-3) and female figures with overemphasized breasts and buttocks (Exhibit A-4), abound in art as symbols of the fertility of the land and its people. The human body has been a departure point for dance and visual art from ancient times to the present day, as

exemplified by the 12th century depiction of the Goddess Sarasvati (Exhibit A-5), a photograph by Edward Weston (Exhibit A-6), and a sculpture by Louise Bourgeois (Exhibit A-7).

Artists are no strangers to controversy or censorship. They often deliberately provoke their audience, goading us to question ourselves and the world around us. Aristophanes did so in his *Lysistrata* (Exhibit B-1), a bawdy plea for peace, and Cindy Sherman does so today in her deliberately disturbing images of deconstructed doll bodies with sexual organs (Exhibit A-8). These provocations are by no means unthinking; rather, they are intended to prod us to greater examination and analysis. The glory of both our Constitution and this Court's jurisprudence is the recognition of the importance of such artistic expression.

There is no question that the First Amendment shields more than classic political speech. Thus, for example, the Court has extended First Amendment protection to entertainment, *Winters v. New York*, 333 U.S. 507, 510 (1948); film, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952); theater, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58 (1975); music, without regard to words, *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989); and parades, with or without banners or written messages, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, ____ U.S. ____, 115 S. Ct. 2338, 2345 (1995).

As the Court recently acknowledged, "the Constitution looks beyond written or spoken words as mediums of expression." *Hurley*, 115 S. Ct. at 2345. If the First Amendment reached only "expressions conveying a 'particularized message,'" its protection "would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll." *Id.*, quoting *Spence v. Washington*, 418 U.S. 405, 411 (1974) (*per curiam*).[4]

Thus, the First Amendment's fundamental purpose is to protect peaceful expression in all of its myriad manifestations. *See Abood v. Detroit Board of Education*, 431 U.S. 209, 231 (1977) ("It is no doubt true that a central purpose of the First Amendment 'was to protect the free discussion of governmental affairs.' But our cases have never suggested that expression about philosophical, social, artistic, economic, literary or ethical matters . . . is not entitled to full First Amendment protection") (citations and footnote omitted); *see also Joseph Burstyn, Inc. v. Wilson*, 343 U.S. at 501 (1952) (motion pictures are fully protected expression that "may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression").[5]

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4. "Visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection. Indeed, written language is far more constricting because of its many variants — English, Japanese, Arabic, Hebrew, Wolof, Guarani, etc. — among and within each group and because some within each language group are illiterate and cannot comprehend their own written language. The ideas and concepts embodied in visual art have the power to transcend these language limitations and reach beyond a particular language group to both the educated and the illiterate. As the Supreme Court has reminded us, visual images are 'a primitive but effective way of communicating ideas . . . a short cut from mind to mind'." *Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996) (footnotes omitted), quoting *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 632 (1943).

5. Even when dealing with obscenity, the Court has recognized that the First Amendment prohibits government regulation as "obscene"

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Modern-day visual, textual and aural creative expression — from the plays of Tony Kushner, to the photographs of Robert Mapplethorpe and Cindy Sherman (Exhibit A-8), to the songs of Alanis Morissette, to the paintings of Robert Colescott (Exhibit A-9), to the performance art of Karen Finley, to the films of Robert Altman and Oliver Stone, and on and on — is under the Constitution entitled to the full protection of the First Amendment. The marketplace of ideas is not limited in its forms of expression.

II. UNLIKE ALL PREVIOUS MEDIA, THE INTERNET HAS THE POTENTIAL TO ELIMINATE ECONOMIC AND CULTURAL BARRIERS TO THE WIDESPREAD COMMUNICATION AND UNDERSTANDING OF ARTISTIC EXPRESSION

The Internet has already proved itself truly revolutionary in its capacity to reduce economic and cultural barriers to the widespread communication and understanding of artistic expression. Unlike other forms of media, what has been labeled the world's "new town square"[6] allows not only the passive receipt of information, but also immediate, one-to-one, one-to-many and many-to-one responses and ongoing dialogue via on-line "chat rooms" regarding artistic images, sounds and text. *See ACLU*, 929 F. Supp. at 881 ("It is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of

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those works which have "serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 26 (1973).

6. President William J. Clinton, State of the Union Address, February 4, 1997.

mass speech that this country — and indeed the world — has yet seen"); *Shea v. Reno*, 930 F. Supp. 916, 922 (S.D.N.Y. 1996) ("[E]merging media technologies quite simply offer an unprecedented number of individual citizens an opportunity to speak and to be heard — at very little cost — by audiences around the world. In that sense, we are encountering a communications medium unlike any we have ever known").

The ever-expanding use of the Internet has led to the daily display and transmission of thousands of images and communications, created and received by an ever-more-diverse population of Internet users. The consequences of providing significant and relatively equal access to all who wish to speak on the Internet has been an astounding explosion in both the diversity of artistic expression and the public's access to those creative labors.[7] For the first time,

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7. Recent articles hailing artistic initiatives on the Internet include the following: Robin Williams, *Robin's World: Art and the Internet in Santa Fe*, The Santa Fe New Mexican, February 2, 1997; *First Night International Premieres Virtual First Night '97, An Internet Celebration*, PR Newswire, Boston, Massachusetts, December 16, 1996; Robert Simonson, *Arts Organizations Continue to Embrace Internet*, Information Access Company, November 15, 1996; Mitch Wagner, *The Internet Gallery: Digital Commerce to Link Fine-Art Buyers, Sellers on the Web*, Computerworld, November 11, 1996; Annette Cardwell, *Cyberspace: NEA Plugs In, Linking Artists on the Internet*, Boston Herald, October 25, 1996; *Internet Work of Art, Priced at Zero Francs, Sells for 58,000*, Agence France Presse, Paris, October 16, 1996; *The Fine Arts Museum of San Francisco Hosts the World's Largest Art Opening*, Business Wire, San Francisco, California, September 30, 1996; Timothy C. Barmann, *CYBERTALK — Art World Takes to the Internet*, Providence Journal Bulletin, September 1, 1996.

Searches with the "Yahoo" Internet search engine alone (*http://www.yahoo.com/arts/*) locate thousands of sites referring to the arts. For example, as of February 20, 1997, 651 sites are listed when the phrase "art history" is searched, 740 when "artists" is

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individual, relatively "unknown" artists and small, not-for-profit organizations — previously unable to afford the means to reach a widespread audience for their endeavors — can now instantly gain access to a worldwide public, simply by establishing a "home page" on the World Wide Web and inviting "visitors" to that site to explore further, or by establishing "links" from other Internet sites to their own creative works. Through the Internet's unique ability to widely disseminate these works for both public appreciation and potential purchase, aspiring playwrights, novelists, filmmakers, poets, painters, sculptors, musicians and performance artists can sustain and support their artistic endeavors.

Museums, libraries and other educational institutions with collections of vast artistic and social value can finally, through the Internet, display their full collections to an enormous array of people, far more than could previously afford to travel to those institutions themselves.[8] The

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searched, 3,424 for "visual arts," 1,887 for "design arts" and 2,041 for "performance arts."

8. The National Gallery of Art in Washington, D.C. (*http://www.nga.gov*) currently has over 10,000 color images of its works available on the Internet, including Monet's *The Bridge at Argenteuil* and Peter Paul Rubens' *Assumption of the Virgin*. Other museums with sites on the Internet include the Museum of Modern Art in New York City (*http://www.moma.org*), featuring Pablo Picasso's *Les Demoiselles D'Avignon* and Piet Mondrian's *Broadway Boogie Woogie*; the Fine Arts Museum of San Francisco, with a database of over 60,000 images (*http://www.thinker.org*); the Louvre (*http://mistral.culture.fr/louvre/*); the New York Public Library of the Performing Arts (*http://www.nypl.org/research/lpa/html*); New York's Lincoln Center (*http://www.linconcenter.org/*); the Brooklyn Academy of Music (*http://www.bam.org/*); the Juilliard School

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convenience and economy of "virtual" visits to an Internet site maintained by an artist, author, musician, filmmaker, gallery, museum or library means that those who were once too poor, too busy, too far away or too intimidated to view, read or listen to artistic expression can now freely receive those works of art.[9] Greater discussion, contemplation and understanding of those works — running the gamut from awestruck appreciation to passionate dislike — is the inevitable and desired result.

In addition, the urge to create — now driven by the knowledge that one's creation may see the daylight of public discussion — continues to swell the tide of diversity in creative artistic expression on the Internet. Much in the way the new medium of video created video artists, the Internet is creating Internet artists out of those who have used different media in the past, as well as those who are emerging for the first time amid the flowering of this new form of expression. "Parkbench," for example, an artistic collaboration between Emily Hartzell and Nina Sobell, links the artists' performance about the creative process, conducted in their studio, to the World Wide Web via video link. Jenny Holzer,

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(*http://www.juilliard.edu/*); Writers Guild of America (*http://www.wga.org/*); the Whitechapel Gallery (*http://www.dircon.co.uk/artonline*); the Smithsonian Institution (*http://www.si.edu*); the Library of Congress (*http://www.loc.gov*); and the American Film Institute (*http://www.afionline.org/home.html*).

9. Even a trip to a particular museum does not guarantee an opportunity to review that institution's full collections, since many museums are as a practical matter unable to publicly showcase more than a small portion of their collections at any one time. No such practical limitation on the display or transmission of artistic images, text or sounds exists with the Internet.

best known for her printed, incised and electronic light-emitting diode text work, now creates on her own Web page, allowing visitors to wander through her creations in any order they choose and to add their personal variations. In her exhibition, "Fear of Offending" (due to open at Los Angeles' Museum of Contemporary Art on March 16, 1997), performance artist Karen Finley asks visitors to the Museum's physical and "virtual" sites to respond to the question, "What do you find offensive?" The responses will be displayed in "real time" on a fountain in the actual gallery and on-line, and will be archived at the Museum (*http://www.moca.org*).

Literary magazines and experiments are also flourishing on the Internet, bringing a new look and sound to the written craft. The Internet's format, with its integration of color, text, "hypertext,"[10] graphics, and sound, has created a new literature. Writers, experimenting with the possibilities, are creating poems and stories which fuse all these elements. If a poem speaks about "mother," a click on that word may bring the reader to a discussion of the poet's mother, a visual representation of her, or even an "audio streaming"[11] of her speaking to the poet. Some writers are experimenting with visual representation of their poetry. Others speak the work aloud as the reader visually scans it, creating a spoken word experience.

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10. Hypertext is coded words and images that appears in bright colors on the computer screen. When "clicked on" by an Internet user, hypertext brings the user to other Internet locations which discuss the hypertext in greater depth.

11. Audio streaming is the technology whereby aural communications can be heard via the Internet. Poetry or a music concert in real-time (*i.e.*, occurring live) can thus be heard with the use of a computer sound-card.

Performances are taking place on the Internet. The Australian artist "stelarc" performs a type of piece he calls "URL body," in which viewers input data into their computers which emerges, via sensors attached to the artist's body, as sensory input stimulating him to move. The performance is literally constructed by the viewers. Musicians also have Web pages listing their lyrics and often inviting interaction with site visitors. Concerts are now "Webcast" live; unhampered by the limitations upon radio waves, which can travel only limited distances, the Internet allows the listener unlimited possibilities for musical pleasure. Filmmakers, via "video streaming," can send their films out to home viewers. Technology is emerging which will soon change what is a somewhat flickering image to a fully-resolved one, enabling filmmakers to transmit, and people in their homes to download, feature-length films.

Art galleries, too, are taking advantage of Internet initiatives. The Union Galleries in Madison, Wisconsin this year held its Ninth Annual Computer Art Invitational, for which artists were required to create new works specifically for display in the gallery (*http//www.visual.arts.ewu.edu*). The University of Southern California is creating a "virtual museum," where visitors employ virtual reality goggles to simulate walking around a sculpture by Auguste Rodin (*http://digimuse.usc.edu/museum.html*).

In sum, the Internet's ability to interconnect media is providing a new arena for collaborative work and viewer interaction on a truly global scale.

III. THE CDA'S "INDECENCY" AND "PATENTLY OFFENSIVE" PROVISIONS ARE UNCONSTITUTIONALLY OVERBROAD

Because the concepts of "indecency" and "patently offensive" vary from community to community (with mere

nudity being declared offensive in some communities[12]), the CDA sweeps into its path some of the greatest works in art history. The statutory language of the CDA's "indecency" and "patently offensive" provisions is unconstitutionally overbroad, since it includes within its ambit (a) artistic creations that cannot seriously be prohibited from viewing by minors; and (b) materials which the adult public has the constitutional right to receive. In criminalizing speech well beyond the traditionally proscribed activities of hard-core obscenity and child pornography, the CDA throws the bathwater out with the baby.

A. Minors Have The Right To Create, Display And Receive Certain "Indecent" And "Patently Offensive" Speech

The CDA impermissibly restricts the right of minors to create, display and receive certain speech which falls under the statute's definition of "indecent" and "patently offensive" speech. As the Court recognized in *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975), "[m]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined

12. People For The American Way publishes an annual book entitled, "Artistic Freedom Under Attack," detailing artwork which has been subject to attack. We credit them for the following two examples of what was found "offensive" in America in 1996: in Berthoud, Colorado, eight pastel figure drawings by David Mesple of realistically-rendered female nudes without genitalia were removed from a community center art display because their depiction was thought inappropriate for children; artist Stephen Halko's "Standing Nude Female," an award-winning charcoal sketch depicting a naked female figure from the neck down, with full frontal nudity, was removed from a student art exhibit at William Penn High School in New Castle, Delaware.

circumstances may government bar public dissemination of protected materials to them." *See also ACLU*, 929 F. Supp. at 853 (noting absence of showing that Government has a "compelling interest" in preventing a seventeen-year-old minor from gaining access via the Internet to images of, *inter alia*, sculptures in India of copulating couples or Francesco Clemente's painting, *Labirinth*).

Some of the greatest treasures of art history are currently available on-line via the Internet, and a substantial number of those images depict nudity to some degree. The broad language of the CDA encompasses many of these works: it is ironic that a seventeen-year-old college freshman, having just seen during an introductory art history lecture the sexual organs of the *Venus of Willendorf* (Exhibit A-4) or the bestiality of Picasso's *Minotaur* (Exhibit A-12) and the violence of his *Les Demoiselles d'Avignon* (Exhibit A-13), and having during her freshman English seminar discussed Tony Kushner's Pulitzer Prize-winning *Angels in America*, a contemporary play about love, politics, and the scourge of AIDS (Exhibit B-2), could not then return to her dormitory room and view those images ~~and~~ text on the Internet. Even the descriptions of nascent sexuality contained in Anne Frank's *Diary of a Young Girl* (Exhibit B-4), a classic of Holocaust literature written by a minor, could subject to prosecution under the CDA one who provides the text "on-line" to college freshmen.

Similarly, implementation of the CDA would mean that the transmission of the sexually explicit song lyrics of popular modern-day musicians such as Alanis Morissette (Exhibit B-5), Nine Inch Nails, Janet Jackson (Exhibit B-3), Coolio and Velvet Underground — presently widely available to teenage minors in music stores, libraries and on radio broadcasts — would constitute criminal conduct when made available for listening on the Internet.

B. The Adult Public Has The Right To Create, Display And Receive "Indecent" And "Patently Offensive" Speech

However "indecent" or "patently offensive" the speech at issue, the Court has recognized that it is absolutely protected as concerns the adult public. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("Sexual expression which is indecent but not obscene is protected by the First Amendment; and the federal parties do not submit that the sale of such materials to adults could be criminalized solely because they are indecent").

Thus, the Court has repeatedly held that the desire to protect adults from offensive messages or speech is insufficient to justify content-based regulation of such speech. "[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978); *see Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) ("An 'outrageousness' standard thus runs afoul of our long-standing refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience"); *Boos v. Barry*, 485 U.S. 312, 322 (1988) (same re "dignity" standard); *Carey v. Population Services International*, 431 U.S. 678, 701 (1977) ("[w]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression"); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the

expression of an idea simply because society finds the idea itself offensive or disagreeable").[13]

That is not to say that such constitutionally protected speech may not be regulated. *Sable Communications*, 492 U.S. at 126 ("[t]he Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest"). However, as the Court has recognized, "[i]t is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Id.* Here, rather than being carefully tailored to address an appropriate compelling interest, the CDA effectively acts as a ban on all adult-to-adult communication of artistic creations which may fall under the statute's rubric of "indecent" or "patently offensive" material.

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13. The Court long ago rejected the contention that speech may be regulated or suppressed because it "attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry." *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684, 688 (1959) (overturning a licensing provision that refused a permit to the film *Lady Chatterly's Lover* on the ground that its depiction of an adulterous relationship was "immoral"); *Joseph Burstyn, Inc.*, 343 U.S. at 505 ("[t]he state has no legitimate interest in protecting any or all religions from views distasteful to them . . . It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures").

C. The CDA Acts As A Virtual Ban On Adult-To-Adult Communication of "Indecent" And "Patently Offensive" Speech

Because it is the very nature of the Internet that any display on a Web site is necessarily available to those under 18 years old, the CDA acts as a virtual ban on adult-to-adult communication of "indecent" and "patently offensive" speech. In *Sable Communications*, the Court struck down under the First Amendment a statutory ban on indecent "dial-a-porn" commercial telephone communications, holding that the statute's "denial of adult access to telephone messages which are indecent but not obscene far exceeds that which is necessary to limit the access of minors to such messages." 492 U.S. at 131. While acknowledging the "compelling interest in protecting the physical and psychological well-being of minors," 492 U.S. at 126, the Court in *Sable* recognized that the challenged regulation would have the "invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear." *Id.* at 131.

The commercial "dial-a-porn" services held protectible in *Sable Communications* had no claim to serious artistic value. The proscriptions of the CDA, however, reach out to criminalize the display on the Internet of such acknowledged works of art as Philip Pearlstein's *Punch On a Ladder*, with its rendition of two female nudes (Exhibit A-10), Rodin's *The Kiss*, depicting a sexual embrace (Exhibit A-11), Aristophanes' *Lysistrata* (Exhibit B-1), or Pablo Neruda's *The Widower's Tango*, with its poetic description of a lover urinating (Exhibit B-6). The CDA acts as a virtual ban on the communication of such text and images, because no content provider on the Internet will reasonably risk criminal prosecution for text or images which may be found "indecent" or "patently offensive" somewhere in the nation. *See Shea v. Reno*, 930 F. Supp. 916, 923 (S.D.N.Y. 1996)

(three-judge panel concluded that plaintiff challenging the "patently offensive" provision of the CDA "has demonstrated a likelihood of success on his overbreadth claim, that § 223(d) would serve as a ban on constitutionally protected indecent communications between adults").

By effectively banning indecent or patently offensive but not obscene adult-to-adult communications on the Internet, the CDA trammels upon the constitutional rights of the adult public to create, display and transmit "indecent" or "patently offensive" speech. Through the display of such images, sound and text, the posting of one-to-many communications, dialogue in on-line "chat rooms," and other forms of participatory speech on the Internet, adults have the potential to reach that portion of the worldwide adult public which may choose to see, read, or listen to these messages. Like the private telephone communications at issue in *Sable*[14], the Internet is a medium in which participants affirmatively elect

14. "The private commercial telephone communications at issue here are substantially different from the public radio broadcast at issue in [*FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (concluding that special treatment of indecent radio broadcast was justified)]. In contrast to public displays, unsolicited mailings and other means of expression which the recipient has no meaningful opportunity to avoid, the dial-it medium requires the listener to take affirmative steps to receive the communication. There is no 'captive audience' problem here; callers will generally not be unwilling listeners. The context of dial-in services, where a caller seeks and is willing to pay for the communication, is manifestly different from a situation in which a listener does not want the received message. Placing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message. Unlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it." *Sable Communications*, 492 U.S. at 127-28.

to participate by "dialing in" and "clicking on" specific Internet sites.[15]

D. The CDA's Qualifying Use of "In Context" and "Contemporary Community Standards" Does Not Save The "Patently Offensive" Provision From Overbreadth

The CDA's use of the term, "in context," to qualify those proscribed images and communications which are "patently offensive," offers no guidance to the potential creation, display or transmission of artwork. It is not at all clear what "context" is being referred to in Section 223(d): the context of a particular image or communication itself, the context of a larger work containing that image or communication, or the context of the Internet medium itself.[16] The phrase, "in

15. The Internet mandates an active search for material by its users through the use of "search engines" which require the user either to enter specific words or pose specific inquiries. As the court below found, "[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident' . . . . Although content on the Internet is just a few clicks of a mouse away from the user, the receipt of information in the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial." *ACLU*, 929 F. Supp. at 844-45; *see id.* at 852 ("[I]t is highly unlikely that a very young child will be randomly 'surfing' the Web and come across 'indecent' or 'patently offensive' material") (Sloviter, J.).

16. As the court below observed, Internet technology undercuts the argument that the "in context" element of §§223(a) and 223(d) will always insulate individuals who present graphic sexual content (*e.g.*, AIDS counseling regarding condom use) embedded in a larger work, since "the use of links effectively excerpts that document by eliminating content unrelated to the link." *ACLU*, 929 F. Supp. at 871 n.11 (Dalzell, J.).

context," is thus both overbroad and unconstitutionally vague. (*See infra* at Part IV).

Nor can one who wishes to create, display or transmit artwork find comfort in the CDA's qualification of the term "patently offensive," as "measured by contemporary community standards." It is a commonplace that the contemporary community standards in Los Angeles and New York City are far different than those community standards which prevail in Topeka or Montgomery.

Criminal prosecutions for material alleged to be "patently offensive" in some communities are all too fresh in the recent memory of the artistic community. In 1990, a Broward County, Florida judge banned the sale of the album entitled "Nasty As They Wanna Be" by the rap music artists, 2 Live Crew, because he found it offensive and a violation of his community's standards of decency. Also in 1990, a Chicago photographer had his apartment raided by the FBI and local police, who seized his prints, negatives and equipment on the ground that his photographs of families and adolescent girls in the nude, which had been widely exhibited in museums and galleries, constituted child pornography. In Fall 1995, the police arrested the owner of a Cincinnati film rental store for "pandering obscenity" because his store rented a video by acclaimed Italian filmmaker Pier Pasolini. In the same city, the director of the Contemporary Art Center, Dennis Barrie, was charged in 1990 with obscenity for displaying the photographic works of Robert Mapplethorpe. While Mr. Barrie was ultimately acquitted, his fear of prosecution was all too well-founded.

The Internet has for the first time in history made the global local, creating a worldwide community of "Netizens" (as they refer to themselves), without geographic borders and with diverse and often divergent cultural values. One who places an artistic image or communication on the Internet can have no way of knowing what zealous prosecutor will seek to

apply his or her community's standards to that work: rather than risk offending a very few, the artist, gallery, museum or literary magazine facing the challenged criminal provisions of the CDA must forsake the opportunity to communicate with the very many.

IV. THE CDA'S "INDECENCY" AND "PATENTLY OFFENSIVE" PROVISIONS ARE UNCONSTITUTIONALLY VAGUE

The CDA's prohibitions on "indecent" and "patently offensive" images and other communications are also unconstitutionally vague, since those terms are not clearly defined by the statute. *See Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) ("[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech . . . , a more stringent vagueness test should apply.") (citations omitted); *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972).

Even if one were to assume that the word, "indecent", as used in the CDA is synonymous with the CDA's use of the phrase, the depiction or description of sexual or excretory activities or organs in a manner "patently offensive as measured by contemporary community standards,"[17] those terms do not have a sufficiently clear meaning when applied to the Internet. The issue of what "community" will apply its

17. This conclusion, urged by appellants, is not supported by a facial reading of the statute. *ACLU*, 929 F. Supp at 861 (Buckwalter, J.); *see also id.* at 856 (Sloviter, J.).

standards to material posted on the Internet is not at all clear: if some uniform national standard of "indecency" is intended, there is no means for ascertaining the scope and nature of that standard. If the relevant community is perhaps instead one where the information is received and where the local jury sits, *see Sable Communications*, 492 U.S. at 125, then every content provider on the Internet must ascertain and comply with the widely disparate community standards of every "community" in the nation or risk criminal prosecution.[18]

This is not an academic issue. No museum or gallery can lightly place on the Internet images of Edouard Manet's *Déjeuner sur l'Herbe (Luncheon on the Grass)*, containing full frontal female nudity (Exhibit A-14)[19], or Egon Schiele's *Autoportrait Se Masturbant* (Exhibit A-15), with its explicit depiction of a sexual act, without fear of criminal prosecution for indecency or patent offensiveness under the CDA.[20]

18. "This conflict inevitably leaves the reader of the CDA unable to discern the relevant 'community standard,' and will undoubtedly cause Internet users to 'steer far wider of the unlawful zone' than if the community standard to be applied were clearly defined. The chilling effect on the Internet users' exercise of free speech is obvious. This is precisely the vice of vagueness." *ACLU*, 929 F. Supp. at 863 (Buckwalter, J.) (citations omitted).

19. *See Finley v. National Endowment for the Arts*, 100 F.3d 671, 684 (9th Cir. 1996) (Kleinfeld, J., dissenting) ("Every general art history textbook reproduces and discusses Edouard Manet's *Luncheon on the Grass*, a painting of a nude woman looking at the artist while two fully clothed men sit next to her and talk to each other. The content and viewpoint doubtless offend, but the art history books are constitutionally protected regardless. There can be no constitutional excuse for allowing the government to censor art on grounds of indecency or offensiveness").

20. "Unlike in the obscenity context, indecency has *not* been defined to exclude works of serious literary, artistic, political or scientific value, and therefore the Government's suggestion that it will not be used to

(Footnote continued on next page)

Similarly, no author or songwriter can make available on the Internet Cole Porter's *Love for Sale* (Exhibit B-7), containing lyrics regarding prostitution, or the graphic description of rape in Alice Walker's acclaimed literary work, *The Color Purple* (Exhibit B-8), without the same legitimate concern. It is no exaggeration to suggest that any one of these artistic, literary or musical creations could meet the CDA's definition of "indecent" or "patently offensive," and thus subjects one who creates and displays or transmits such works on the Internet to potential criminal prosecution.

V. THE STATUTORY "DEFENSES" OF THE CDA ARE EFFECTIVELY UNAVAILABLE TO NON-COMMERCIAL ENTITIES

It is undisputed that the Internet is an "especially attractive means for not-for-profit entities or public interest groups to reach their desired audiences." *ACLU*, 929 F. Supp. at 842. While *amici* do not oppose an effective, affordable and narrowly-tailored means by which to limit access by minors to certain "indecent" or "patently offensive" materials on the Internet while preserving the rights of the adult public to create, display and transmit such materials, the defenses established by the CDA — debit or credit card verification, adult verification by password or adult personal identification number, and "tagging" and blocking of prohibited material — are for the reasons noted by the court below, not presently viable for non-commercial, not-for-profit entities or impecunious artists. *ACLU*, 929 F. Supp. at 849; *accord*, *Shea v. Reno*, 930 F. Supp. 916, 922 (S.D.N.Y.

(Footnote continued from previous page)

prosecute publishers of such materials is without foundation in the law itself." *ACLU*, 929 F. Supp. at 863 (Buckwalter, J.).

1996) (three-judge panel concluded that "[t]he technological impossibility of independent compliance with the affirmative defenses renders § 223(d) [of the CDA] unconstitutional as an overbroad prohibition on constitutionally protected indecent speech between adults").

The medium-specific inquiry employed by the Court in *Pacifica*, *Sable Communications*, and most recently in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, ___ U.S. ___, 116 S. Ct. 2374, 2390-94 (1996) (striking down under First Amendment statutory requirement that cable television system operators segregate and block "patently offensive" sex-related material on leased channels in order to protect minors), is the appropriate inquiry here. Unlike radio broadcasts or cable television transmissions — where program providers have the ability to act as central "gatekeepers" in determining content and timing of transmitted material — the uniquely diffuse and democratic nature of the Internet is such that no "gatekeeper" can effectively monitor and control program content.

Amici support the development of mechanisms by which parents and those who create, display or transmit artistic images and communications on the Internet may themselves elect to prevent children from viewing, reading or hearing their works. Until that day arrives, however, our cherished First Amendment freedoms cannot be threatened by a regulatory system that chills creative artistic expression by subjecting artists to criminal prosecution for material which both adults and minors have the right to receive.

Conclusion

For the foregoing reasons, the judgment of the three-judge court in the Eastern District of Pennsylvania should be affirmed.

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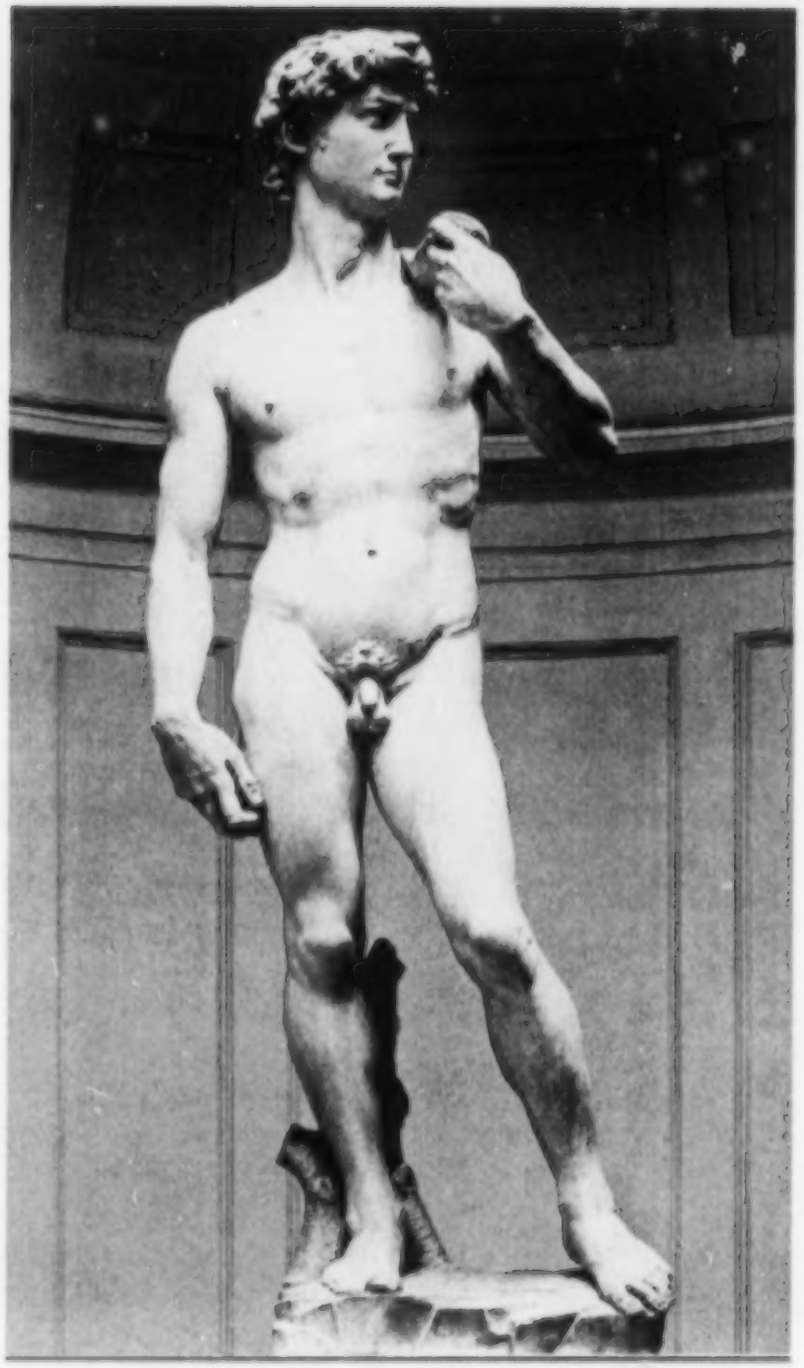
APPENDICES

APPENDIX A

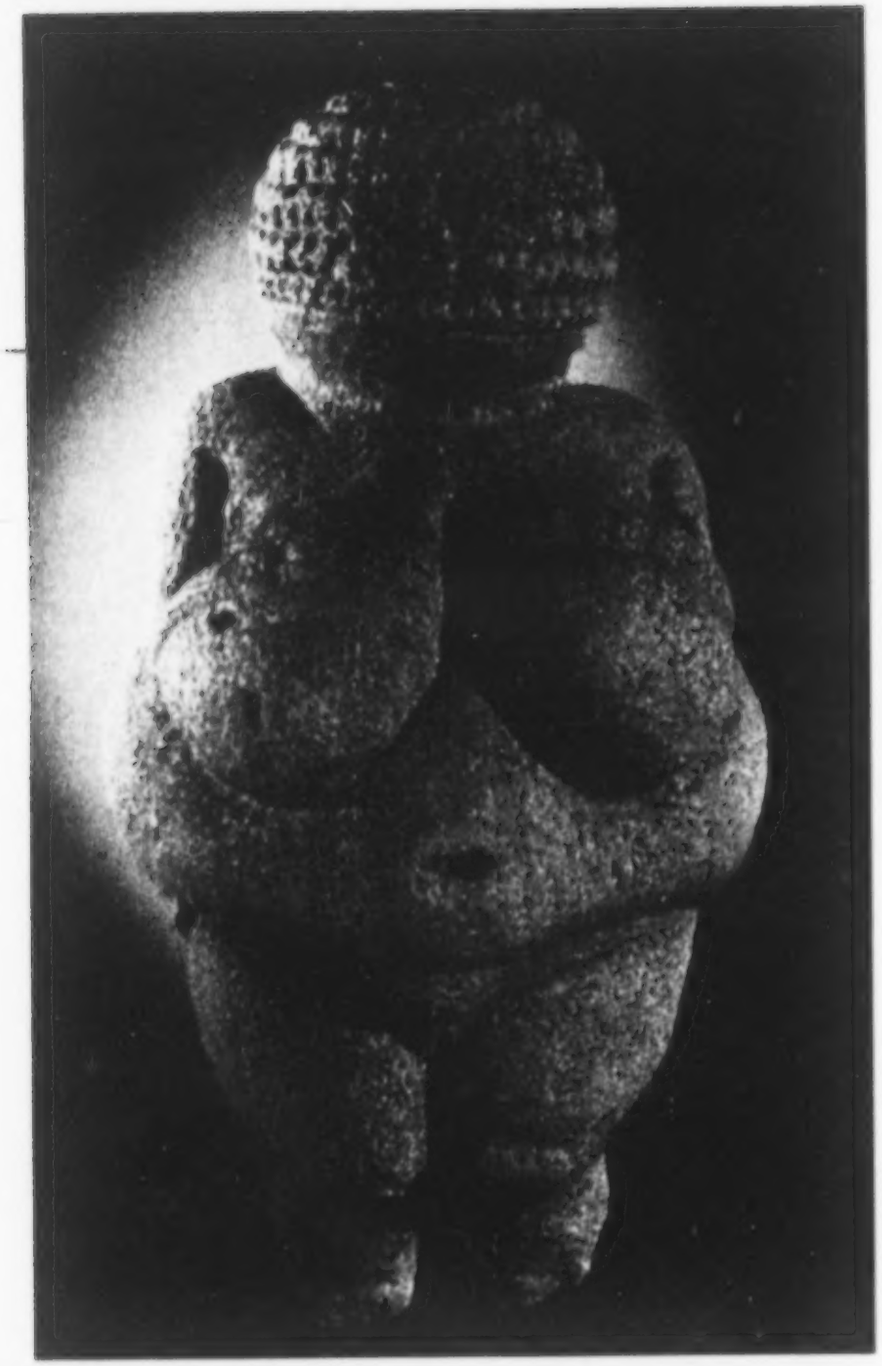
A-1 Michelangelo, *David*, 1501-04
A-2 Jan van Hemessen, *Madonna and Child*, 1543
A-3 Fon? bo, Republic of Benin
A-4 Venus of Willendorf, Paleolithic
A-5 Jagaddeva, *The Goddess Sarasvati*, 1153
A-6 Edward Weston, *Half Nude*, 1924
A-7 Louise Bourgeois, *Fillette*, 1968
A-8 Cindy Sherman, *Untitled #261*, 1991 (Courtesy of the artist and Metro Pictures)
A-9 Robert Colescott, *I Gets a Thrill Too When I Sees De Koo*, 1978
A-10 Philip Pearlstein, *Punch on a Ladder #3*, 1996
A-11 Auguste Rodin, *The Kiss*, 1886-98
A-12 Pablo Picasso, *Minotaur Assaulting Girl*, 1933
A-13 Pablo Picasso, *Les Demoiselles D'Avignon*, 1907
A-14 Edouard Manet, *Déjeuner sur L'Herbe*, 1863
A-15 Egon Schiele, *Autoportrait Se Masturbant*, 1911



Michelangelo
David, 1501-04

Jan van Hemessen
Madonna and Child, 1543

Fon ? bo
Republic of Benin

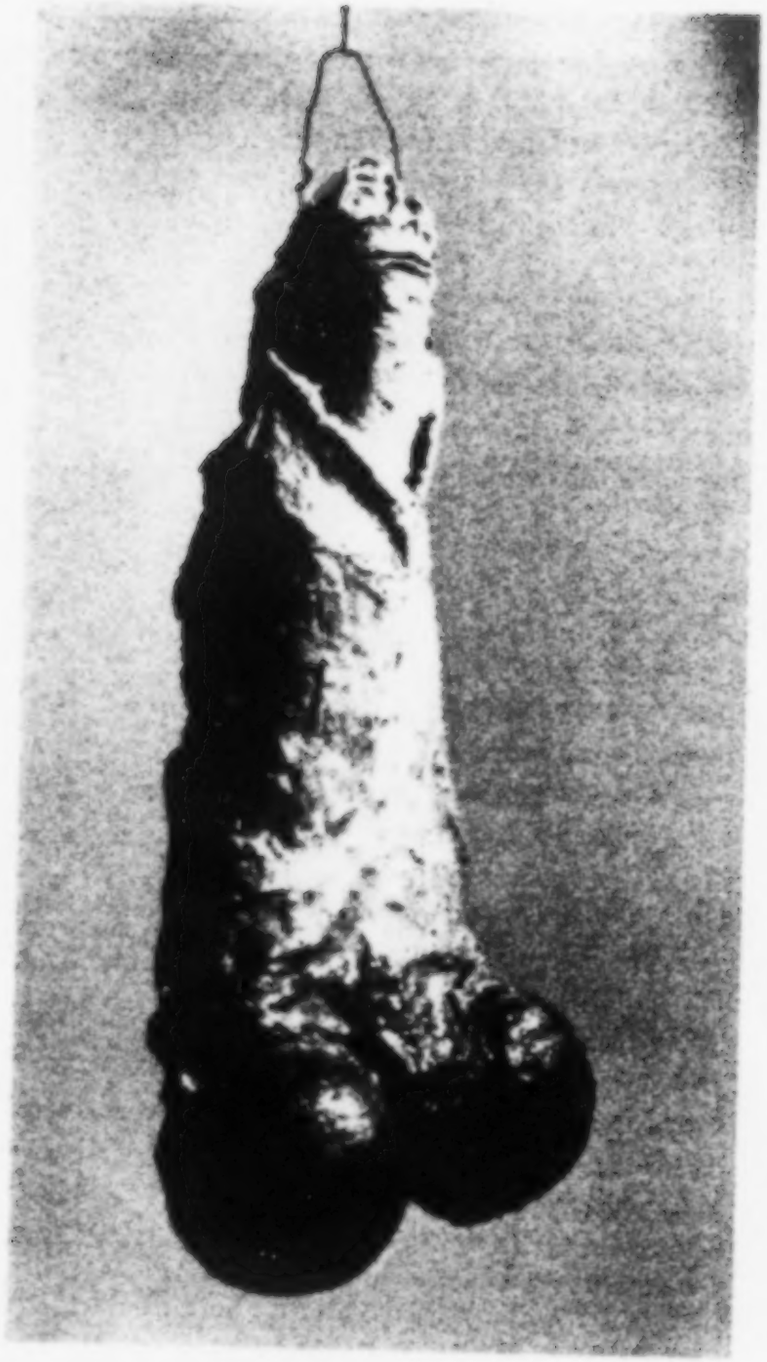


Venus of Willendorf
Paleolithic

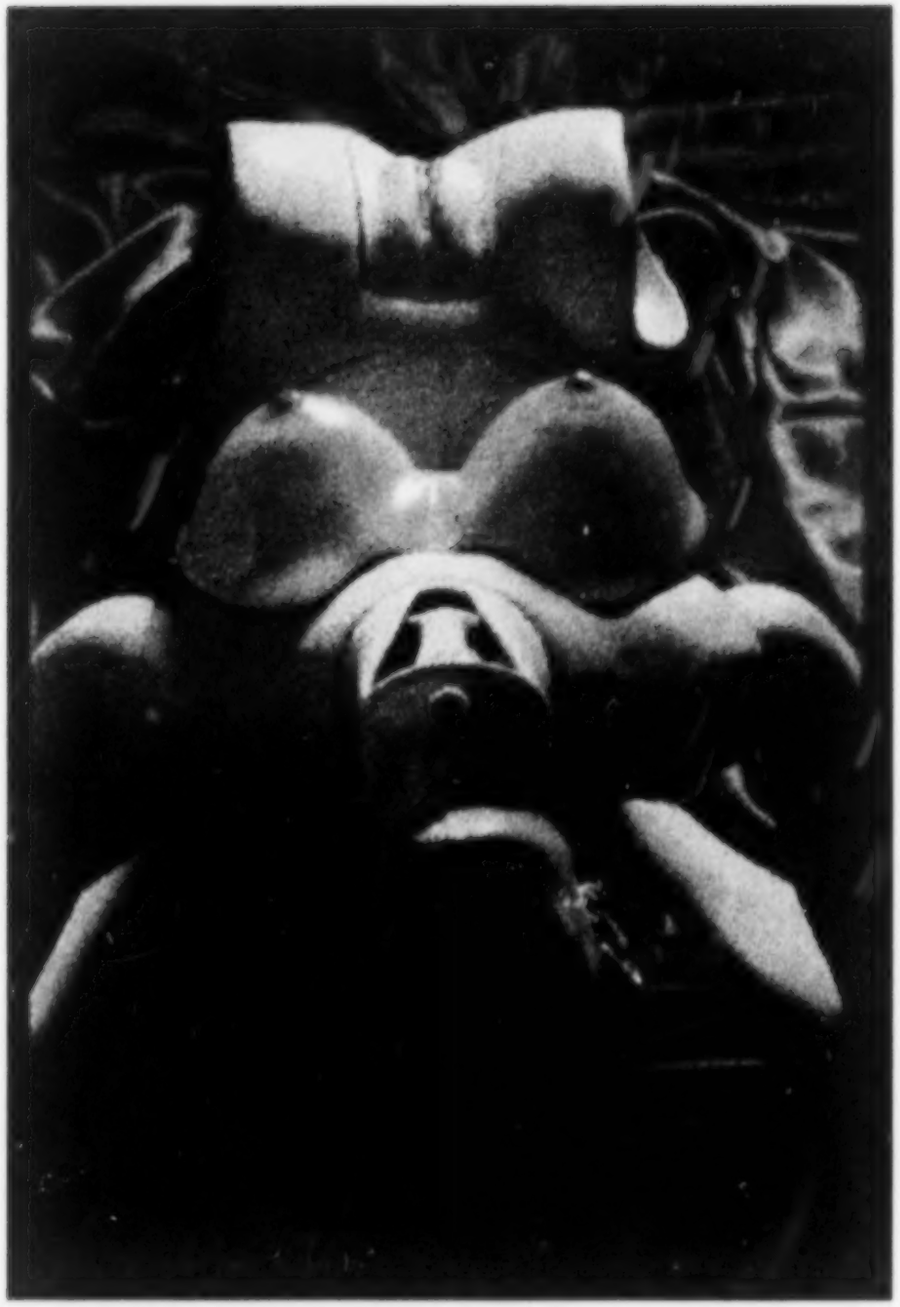
http://www.lacma.org/Masterpieces/mast099.htm

Jagaddeva
The Goddess Saraswati, 1153

Edward Weston
Half Nude, 1924

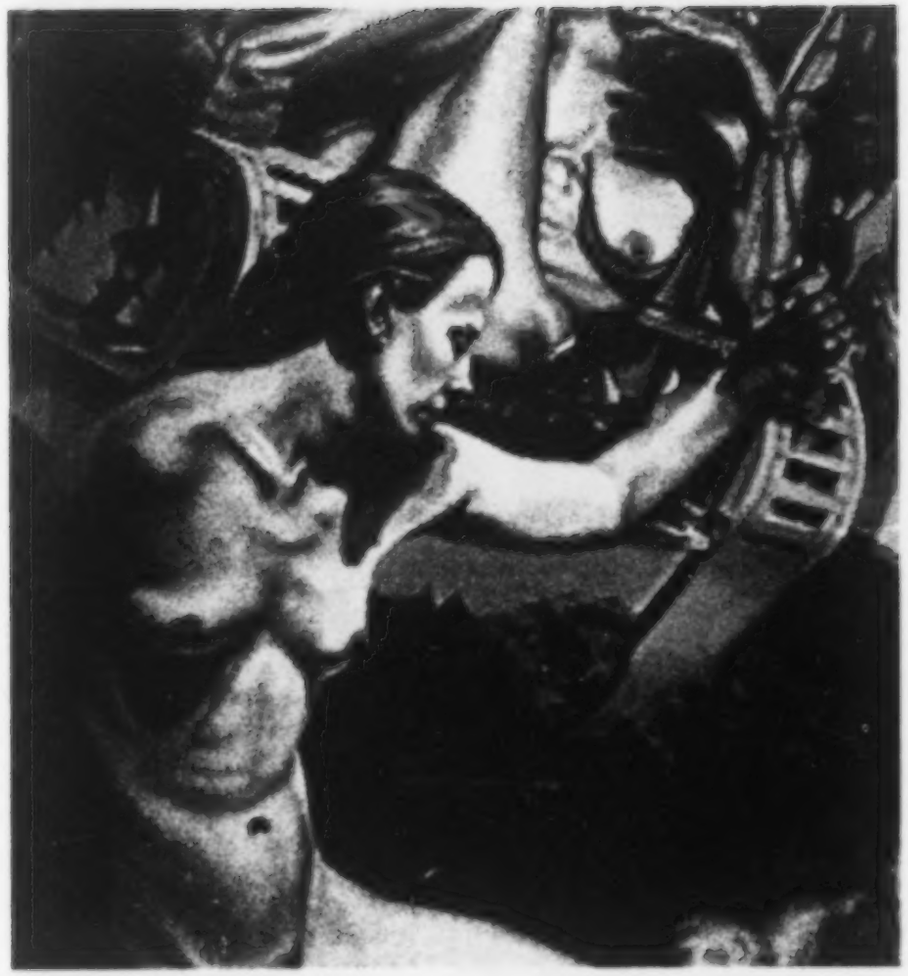


Louise Bourgeois
Fillette, 1968



Cindy Sherman
Untitled #261, 1992
(Courtesy of the artist and Metro Pictures)

Robert Colescott
I Gets a Thrill Too When I Sees De Koo, 1978



Philip Pearlstein
Punch on a Ladder #3, 1996

Auguste Rodin
The Kiss, 1886-98

Pablo Picasso
Minotaur Assaulting Girl, 1933

Pablo Picasso
Les Demoiselles D'Avignon, 1907

Edouard Manet
Déjeuner sur L'Herbe, 1863

Egon Schiele
Autoportrait Se Masturbant, 1911

APPENDIX B

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B-2 *Angels in America, Part One: Millennium Approaches*, Tony Kushner
B-3 *janet*, Janet Jackson
B-4 *The Diary of a Young Girl: The Definitive Edition*, Anne Frank
B-5 *Jagged Little Pill*, Alanis Morissette
B-6 *The Widower's Tango*, Pablo Neruda
B-7 *Love for Sale*, Cole Porter
B-8 *The Color Purple*, Alice Walker

B-1. **LYSISTRATA,** Aristophanes.

She's gone and left me with an anguished pulse.
What shall I put thee in (O woe!)
Since into something thou must go,
Poor little lad . . . he pines and peeks.
Our lovely girl has proved a curse.
(Where's Cynalopex?)
A nurse to cherish him, a nurse!

MEN. Balked in your amorous delight
How melancholy is your plight.
With sympathy your case I view!
What loins, I ask, what liver too,
What cods, what buttocks, could sustain
This awful stretch and stiffening strain,
And not a single trace
Of lewd-thighed wenches in the place!

CINESIAS. O Zeus, what sinewy suffering!

MEN. She did it all, the harlot, she
With her atrocious harlotry.

WOMEN. Nay, rather call her darling sweet.

MEN. What, sweet? She's a rude, wicked thing.

CINESIAS. A wicked thing, as I repeat.
O Zeus, O Zeus,
Canst thou not suddenly let loose
Some twirling hurricane to tear
Her flapping up [along the air
And drop her, when she's whirled around,
Here to the ground
Neatly impaled upon this stake
That rises only for her sake.

B-2. **ANGELS IN AMERICA, PART ONE: MILLENNIUM APPROACHES**, Tony Kushner, (New York, NY: Theatre Communications Group, 1992.)

p. 39

Prior: I like this; very zen; it's...reassuringly incomprehensible and useless. We who are about to die thank you.

Louis: You are not about to die.

Prior: It's not going well, really...two new lesions. My leg hurts. There's protein in my urine, the doctor says, but who knows what the fuck that portends. Anyway, it shouldn't be there, the protein. My butt is chapped from diarrhea and yesterday I shat blood.

Louis: I really hate this. You don't tell me...

Prior: You get too upset, I wind up comforting you. It's easier...

Louis: Oh thanks.

Prior: If it's bad I'll tell you.

Louis: Shitting blood sounds bad to me.

Prior: And I'm telling you.

Louis: And I'm handing it.

Prior: Tell me some more about justice.

Louis: I *am* handling it.

Prior: Well Louis you win Trooper of the Month.

(*Louis starts to cry.*)

p. 44-45

Henry: Roy, you have been seeing me since 1958. Apart from the facelifts I have treated you for everything from syphilis...

Roy: From a whore in Dallas.

Henry: From syphilis to venereal warts. In your rectum. Which you may have gotten from a whore in Dallas, but it wasn't a female whore.

(Pause.)

Roy: So say it.

Henry: Roy Cohn, you are...

You have had sex with men, many many times, Roy, and one of them, or any number of them, has made you very sick. You have AIDS.

Roy: AIDS.

Your problem, Henry, is that you are hung up on words, on labels, that you believe they mean what they seem to mean. AIDS. Homosexual. Gay. Lesbian. You think these are names that tell you who someone sleeps with, but they don't tell you that.

Henry: No?

Roy: No. Like all labels they tell you one thing and one thing only: where does an individual so identified fit in the food chain, in the pecking order? Not ideology, or sexual taste, but something much simpler: clout. Not who I fuck or who fucks me, but who will pick up the phone when I call, who owes me favors. This is what a label refers to. Now to someone who does not understand this, homosexual is what I am because I have sex with

men. But really this is wrong. Homosexuals are not men who sleep with other men. Homosexuals are men who in fifteen years of trying cannot get a pissant antidiscrimination bill through City Council. Homosexuals are men who know nobody and who nobody know. Who have zero clout. Does this sound like me, Henry?

B-3. **janet**, Janet Jackson.

"If"

"Take your time, we've got all night
You on the rise as you're touchin' my thighs
And let me know what you like.
If you like, I'll go down...
I'll hold you in my hand and baby
Your smooth and shiny feels good against my lips, sugar
I want you so bad I can taste your love."

B-4. **DIARY OF A YOUNG GIRL: THE DEFINITIVE VERSION**, Anne Frank.

Thursday, January 6, 1944

Dearest Kitty,

Today I have two things to confess. It's going to take a long time, but I have to tell them to someone, and you're the most likely candidate, since I know you'll keep a secret, no matter what happens.

The first is about Mother. As you know, I've frequently complained about her and then tried my best to be nice. I've suddenly realized what's wrong with her. Mother has said that she sees us more as friends than as daughters. That's all very nice, of course, except that a friend can't take the place of a mother. I need my mother to set a good example and be a person I can respect, but in most matters she's an example of what *not* to do. I have the feeling that Margot thinks so differently about these things that she'd never be able to understand what I've just told you. And Father avoids all conversations having to do with Mother.

I imagine a mother as a woman who, first and foremost, possesses a great deal of tact, especially toward her adolescent children, and not one who, like Momsy, pokes fun at me when I cry. Not because I'm in pain, but because of other things.

This may seem trivial, but there's one incident I've never forgiven her for. It happened one day when I had to go to the dentist. Mother and Margot planned to go with me and agreed I should take my bicycle. When the dentist was finished and we were back outside, Margot and Mother very sweetly informed me that they were going downtown to buy or look at something, I don't remember what, and of course I wanted to go along. But they said I couldn't come because I

had my bike with me. Tears of rage rushed to my eyes, and Margot and Mother began laughing at me. I was so furious that I stuck my tongue out at them, right there on the street. A little old lady happened to be passing by, and she looked terribly shocked. I rode my bike home and must have cried for hours. Strangely enough, even though Mother has wounded me thousands of times, this particular wound still stings whenever I think of how angry I was.

I find it difficult to confess the second one because it's about myself. I'm not prudish, Kitty, and yet every time they give a blow-by-blow account of their trips to the bathroom, which they often do, my whole body rises in revolt.

Yesterday I read an article on blushing by Sis Heyster. It was as if she'd addressed it directly to me. Not that I blush easily, but the rest of the article did apply. What she basically says is that during puberty girls withdraw into themselves and begin thinking about the wondrous changes taking place in their bodies. I feel that too, which probably accounts for my recent embarrassment over Margot, Mother and Father. On the other hand, Margot is a lot shyer than I am, and yet she's not in the least embarrassed.

I think that what's happening to me is so wonderful, and I don't just mean the changes taking place on the outside of my body, but also those on the inside. I never discuss myself or any of these things with others, which is why I have to talk about them to myself. Whenever I get my period (and that's only been three times), I have the feeling that in spite of all the pain, discomfort and mess, I'm carrying around a sweet secret. So even though it's a nuisance, in a certain way I'm always looking forward to the time when I'll feel that secret inside me once again.

Sis Heyster also writes that girls my age feel very insecure about themselves and are just beginning to discover

that they're individuals with their own ideas, thoughts and habits. I'd just turned thirteen when I came here, so I started thinking about myself and realized that I've become an "independent person" sooner than most girls. Sometimes when I lie in bed at night I feel a terrible urge to touch my breasts and listen to the quiet, steady beating of my heart.

Unconsciously, I had these feelings even before I came here. Once when I was spending the night at Jacque's, I could no longer restrain my curiosity about her body, which she'd always hidden from me and which I'd never seen. I asked her whether, as proof of our friendship, we could touch each other's breasts. Jacque refused. I also had a terrible desire to kiss her, which I did. Every time I see a female nude, such as the Venus in my art history book, I go into ecstasy. Sometimes I find them so exquisite I have to struggle to hold back my tears. If only I had a girlfriend!

B-5. **JAGGED LITTLE PILL**, Alanis Morissette.

"You Oughta Know"

"An older version of me
Is she perverted like me
Would she go down on you in a theatre?"

"It was a slap in the face
How quickly I was replaced

And are you thinking of me when you fuck her?"

B-6. **THE WIDOWER'S TANGO***, Pablo Neruda.

"Oh evil one, you must by now have found the letter, you
must have wept with fury,
and you must have insulted my mother's memory,
calling her rotten bitch and mother of dogs,
you must have drunk alone, all by yourself, your twilight tea,
looking at my old shoes forever empty,
and you won't be able any longer to recall my illnesses, my
night dreams, my meals,
without cursing me aloud as if I were still there,
complaining about the tropics, about the *corringhis* coolies,
about the poisonous fevers that did me so much harm,
and about the frightful Englishmen that I still hate.

Evil one, really, what an enormous night, what a lonely earth!
I have come again to the solitary bedrooms,
to lunch on cold food in the restaurants, and again
I throw my trousers and shirts upon the floor,
there are no coat hangers in my room, no pictures of anyone
on the walls.
How much of the darkness in my soul I would give to get you
back,
and how threatening to me seem the names of the months,
and the word "winter," what a mournful drum sound it has.

Buried next to the coconut tree you will later find
the knife that I hid there for fear that you would kill me,
and now suddenly I should like to smell its kitchen steel

* Neruda was a widower only to the extent that he thought he had escaped from Josie Bliss, the Burmese girl to whom this poem is addressed. See also p. 206 -- D.D.W.

accustomed to the weight of your hand and the shine of your
foot:
under the moisture of the earth, among the deaf roots,
of all human languages the poor thing would know only your
name,
and the thick earth does not understand your name
made of impenetrable and divine substances.

Just as it afflicts me to think of the clear day of your legs
curled up like still and harsh solar waters,
and the swallow that sleeping and flying lives in your eyes,
and the furious dog that you shelter in your heart,
so too I see the deaths that are between us from now on,
and I breathe in the air ashes and destruction,
the long, solitary space that surrounds me forever.

I would give this giant sea wind of your brusque breath
heard in long nights with no mixture of oblivion,
merging with the atmosphere like the whip with the horse's
hide.
And to hear you making water in the darkness, at the back of
the house,
as if spilling a thin, tremulous, silvery, persistent honey,
how many times would I give up this chorus of shadows that
I possess,
and the noise of useless swords that is heard in my heart,
and the bloody dove that sits alone on my brow
calling for vanished things, vanished beings,
substances strangely inseparable and lost.

B-7. **LOVE FOR SALE**, Cole Porter.

VERSE

When the only sound in the empty street
is the heavy tread of the heavy feet
that belong to a lonesome cop,
I open shop.
When the moon so long has been gazing down
on the wayward ways of this wayward town
that her smile becomes a smirk,
I go to work.

REFRAIN

Love for Sale,
appetizing young love for sale.
Love that's fresh and still unspoiled,
Love that only slightly soiled,
Love for Sale.
Who will buy?
Who would like to sample my supply?
Who's prepared to pay the price
for a trip to paradise?
Love for Sale.
Let the poets pipe of love
in their childish way,
I know ev'ry type of love
better far than they.
If you want the thrill of love,
I've been thru the mill of love,
old love, new love,
ev'ry love but true love.
Love for Sale,
appetizing young love for sale.
If you want to buy my wares
follow me and climb the stairs,
Love for Sale.

B-8. **THE COLOR PURPLE,** Alice Walker.

You better not never tell nobody but God. It'd kill your mammy.

Dear God,

I am fourteen years old. I have always been a good girl. Maybe you can give me a sign letting me know what is happening to me.

Last spring after little Lucious come I heard them fussing. He was pulling on her arm. She say It too soon, Fonso, I ain't well. Finally he leave her alone. A week go by, he pulling on her arm again. She say Naw, I ain't gonna. Can't you see I'm already half dead, an all of these chilren.

She went to visit her sister doctor over Macon. Left me to see after the others. He never had a kine word to say to me. Just say You gonna do what your mammy wouldn't. First he put his thing up gainst my hip and sort of wiggle it around. Then he grab hold my titties. Then he push his thing inside my pussy. When that hurt, I cry. He start to choke me, saying You better shut up and git used to it.

But I don't never git used to it. And now I feels sick every time I be the one to cook. My mama she fuss at me an look at me. She happy, cause he good to her now. But too sick to last long.

APPENDIX C

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RONALD FELDMAN FINE ARTS INC.
THEATRE COMMUNICATIONS GROUP
ALBANY/SCHENECTADY LEAGUE OF ARTS, INC.
CALIFORNIA LAWYERS FOR THE ARTS
COLORADO LAWYERS FOR THE ARTS
CONNECTICUT VOLUNTEER LAWYERS FOR THE ARTS
MAINE LAWYERS AND ACCOUNTANTS FOR THE ARTS
MARYLAND LAWYERS FOR THE ARTS
ST. LOUIS VOLUNTEER LAWYERS AND ACCOUNTANTS FOR THE ARTS
VOLUNTEER LAWYERS FOR THE ARTS, D.C.
VOLUNTEER LAWYERS FOR THE ARTS OF MASSACHUSETTS, INC.

Supreme Court, U.S.
FILED
FEB 20 1997

No. 96-511

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Appellants,

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.,

Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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BRIEF OF PLAYBOY ENTERPRISES, INC. AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-511

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Appellants,

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.,

Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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BRIEF OF PLAYBOY ENTERPRISES, INC. AS AMICUS CURIAE IN SUPPORT OF APPELLEES

INTEREST OF AMICUS CURIAE[1]

Playboy Enterprises, Inc. ("PEI") is a Delaware corporation with its main offices in Chicago, Illinois. Among other commercial endeavors, PEI publishes *Playboy* magazine and *Playboy* newsstand special issues. In August 1994, *Playboy* became the first national magazine to publish on the World Wide Web.[2]

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[1] The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court.

[2] The Playboy website is located at http://www.playboy.com.

Playboy magazine is an award-winning publication, containing fiction; interviews with noted figures in politics, sports, government, entertainment, business and the arts; artwork by noted artists; and pictorials of beautiful women. *Playboy* is the number one men's magazine in the world, outselling rival publications in the United States such as *GQ* and *Esquire* by more than four to one. In 1993-95, for example, *Playboy*'s circulation exceeded those of major magazines such as *Newsweek*, *Smithsonian*, *Sports Illustrated*, *U.S. News and World Report*, *GQ*, *Esquire*, and *Rolling Stone* combined.[3]

Playboy averages 199 pages per month. About 29 pages, or roughly 15 percent, typically contain photographs of nude or partially clothed women. Most of *Playboy*'s pages contain articles and other material directed at men's interests such as current affairs, health, and sports. Approximately 25 percent of *Playboy* magazine is devoted to items of general interest, approximately 18 percent to culture or the humanities, 16 percent to amusements (including personalities or issues related to the screen, theater, television, or radio), nine percent to national and international affairs, seven percent to fiction, seven percent to apparel and grooming, six percent to sports and recreation, and the balance to home furnishings, food, health, and business.

Playboy is well known for its publication of fine fiction. The list of authors who have contributed fiction and other articles to *Playboy* includes Margaret Atwood, Gabriel Garcia Marquez, Doris Lessing, David Mamet, Erica Jong, William F. Buckley, Jr., John LeCarre, Saul Bellow, Isaac Asimov, Justice William O. Douglas, Graham Greene, Norman Mailer, T. Coraghessan Boyle, and John Steinbeck. *Playboy* is also well known for its publication of in-depth interviews with figures from the worlds of politics, sports, government, entertainment, business, and the arts. The list of *Playboy*'s interview subjects includes Jimmy Carter, Martin Luther King, Jr., Lech Walesa, Barbara Streisand, Yasser Arafat, the Reverend Jesse Jackson, James Carville, Andrew

[3] *Playboy*'s guaranteed U.S. rate base is 3,150,000 copies sold. With 15 international editions, *Playboy*'s *worldwide* monthly readership is estimated at 15 million.

Young, Billie Jean King, Michael Jordan, Candice Bergen, and Whoopi Goldberg.

Playboy's textual content has won many awards for excellence. For example, *Playboy* has been awarded the distinguished National Magazine Award "for excellence in fiction," which is granted to one magazine each year by the American Society of Magazine Editors in conjunction with the Columbia University School of Journalism, as well as the National Conference of Christians and Jews Certificate of Recognition. In addition, the artwork published in *Playboy* has received hundreds of design awards, including 194 awards from The Society of Publication Designers, 19 Gold Medals from The Society of Illustrators, and 23 Silver Medals from the Art Directors Club of New York/The One Show. *Playboy* has published the work of such artists as Andy Warhol, Keith Haring, and LeRoy Neiman.

PEI's website reflects the same editorial philosophy and content as *Playboy* magazine. By late 1996, the website encompassed more than 700 pages, providing visitors with excerpts from current and historic issues of *Playboy* magazine, plus schedules for Playboy Television. The Playboy website is supported by advertising revenues. In addition, Playboy offers an online version of the Playboy catalog, which offers branded merchandise for purchase.

During its 43-year history, Playboy has always supported an individual's right to choose what to read or to view. Accordingly, with respect to its website, Playboy strongly supports the various private-sector initiatives that employ Internet screening technologies to enable people, particularly parents, to block information or images that they deem unsuitable for their particular households. Accordingly, the Playboy website is registered with RSACi, and access can be blocked from any household that employs screening software.[4]

[4] The Recreational Software Advisory Council developed a rating system for the Internet that permits individuals to tailor their content preferences for newsgroups, FTP sites and the World Wide Web. Parents can set various tolerance levels (on a 1 to 4 scale) in the categories of violence, language, nudity and sex. The software is PICS compatible and can be set to block unrated sites.

Playboy magazine, special issues, its videos, and its website are fully protected by the United States Constitution. In over forty years of publishing, *Playboy* has never been judged "obscene," "pornographic," or "harmful to minors" in any federal, state or local jurisdiction. The Attorney General's Commission on Pornography ("Meese Commission") found that the type of images that appear in *Playboy* are not a threat to "individuals, families, or society," and pointed out that "[t]he true pornography industry is quite simply different from and separate from the industry that publishes 'men's' magazines."[5] The Commission acknowledged that "[f]ederal courts have found serious value contained in *Playboy* magazine,"[6] and characterized "[a]ttempted and unsuccessful actions * * * against *Playboy* magazine in Atlanta and several other places" as "mistakes."[7]

Despite these facts, PEI's website is threatened by the Communications Decency Act ("CDA"). Not only did the CDA's congressional sponsors make clear that they intended to catch *Playboy* in their net,[8] such a broad intention has been understood and applied by the Act's enforcers[9] and is cur-

[5] *See* Final Report, The Attorney General's Commission on Pornography 284, 348 (1986) [hereinafter "Meese Commission Report"]. The Commission reported that "excessively broad terms like 'pornography' or 'sexually explicit materials' are just too encompassing to reflect the results of our inquiry," *id.* at 320, and noted that "we could envision aesthetically-posed, air brushed photographs of beautiful men or women in a provocative context. The provocation derives from the power of sex to attract the attentions and stir the passions of all of us. Such materials may have, in most uses, little negative effect on individuals, families, or society." *Id.* at 348.

[6] *Id.* at 1289 (citing *Penthouse Int'l* v. *McAuliffe*, 610 F.2d 1353 (5th Cir.), *cert. dismissed*, 447 U.S. 931 (1980)).

[7] *Id.* at 271.

[8] 141 Cong. Rec. S8330 (daily ed. June 14, 1995) (statement of Sen. Exon) ("I am not talking *just* about *Playboy* and *Penthouse* magazines. By comparison, those magazines pale in offensiveness with the other things that are readily available." (emphasis added)).

[9] The court below ordered the government to cease any "review" or "investigation" of images purportedly taken from a

rently being defended by the Solicitor General.[10] Just last week, a Senate sponsor of the CDA told Congress that the law was necessary to proscribe a broad range of speech, including "glimpses of * * * Playmates" on the Playboy website.[11] Consequently, PEI has a vital stake in the outcome of this case.

SUMMARY OF ARGUMENT

The First Amendment is predicated on the principle that the essential remedy to "bad" speech is not censorship, but more speech. In its defense of the CDA, however, the government asserts that control over the Internet is needed because "millions of people disseminate information * * * without the intervention of editors, network censors, or market disincentives." Appellants' Br. at 32. As Judge Dalzell correctly wrote in the decision below, "[t]his argument is profoundly repugnant to First Amendment principles." App. 142a.

Recognizing that Internet communication is precisely the kind of speech that the First Amendment was intended to protect, the court below correctly held that it should receive the same degree of protection under First Amendment as other forms of core speech. Ever since the printing press was invented, new communications technologies have been viewed as a threat to society and to those in power. As a

CompuServe database that it characterized as "analogous to *Playboy* or *Penthouse* centerfolds." *ACLU* v. *Reno*, 24 Media L. Rep. (BNA) 1795 (E.D. Pa. May 15, 1996). The government took the position at that time that "a *Playboy* centerfold appeals to the prurient interest," *id.* at 1797, and that the materials it presented at trial in the Schmidt notebook (which at Tab 42 included images taken from the April 1996 issue of *Playboy* magazine) were "indecent" within the CDA's terms, *id.* at 1797 n.2.

[10] *See* Appellants' Br. at 20 (images in "soft-porn" magazines "almost always would be covered"); *id.* at 33 (Schmidt notebook "graphically illustrates the dimensions of the problem"); *id.* at 43 (CDA indecency restrictions are "similar to the R-rating for movies").

[11] 143 Cong. Rec. S1355, S1356 (daily ed. Feb. 13, 1997) (statement of Sen. Coats). This assertion appears to conflict with the definition of "indecency" advocated by congressional amici. *See infra* pp. 22, 26.

result, innovation always has invited censorship. The Framers, however, recognized that the political debate made possible by new forms of speech could play an essential role in protecting liberty against governmental intrusion. Therefore, in order to prevent this type of repression from recurring in the future, the Framers decided to protect all new forms of communication by enshrining the freedom of speech and of the press in the First Amendment, thus denying the government the power to censor any and all new types of speech. Although this Court has in the past applied differing levels of protection to various media based upon their particular characteristics, it has over time recognized that the basic principles of the First Amendment should be the rule, regardless of the technical details of the various media. The lessons from this long period of experimentation should be applied here.

Additionally, this Court should affirm the decision below because the indecency standard is vague and antithetical to First Amendment values. Contrary to the government's assertion that the CDA respects literary works of "serious merit," the indecency standard imposes a legal regime identical to the one that was applied in the United States decades ago, when vital literary works were routinely suppressed, but was eventually and rightfully rejected. The indecency standard effectively reprises the worst portions of the old, discredited obscenity standard: unlike the current test for obscenity, indecency does not respect the rights of the average community member, pays no attention to literary works "as a whole," and provides no analytical framework to consider serious merit. For that reason, experience with the indecency standard demonstrates that it intrudes too deeply into First Amendment values to be sustained.

ARGUMENT

I. COMPUTER COMMUNICATION IS ENTITLED TO FULL FIRST AMENDMENT PROTECTION.

The court below concluded that the CDA must be subjected to First Amendment strict scrutiny. App. 67a-68a (Sloviter, C.J.). The government and its amici, however, urge this Court to adopt a far lower level of constitutional protection

for speech transmitted via computers. *See, e.g.*, Appellants' Br. at 36-37 (CDA should be considered "cyberzoning").

This Court need not and should not fashion new First Amendment standards to govern new forms of communication. Indeed, to do so would be quite ironic: it was the Framers' appreciation for the democratizing power of new forms of communication that led them to protect freedom of the press in the first place. In contrast to European governments, which began to censor speech because the printing press enabled citizens to express their (often anti-establishment) political views in powerful and far-reaching ways, the Framers recognized that new forms of speech could create a highly active and uninhibited communications environment in which political expression could thrive. Thus protecting emerging forms of speech constituted a vital means of preventing the federal government from infringing upon individual liberty.[12]

The Framers' desire to protect emerging forms of communication notwithstanding, the sad reality is that new communications technologies often are born in captivity. Supported by Justice Jackson's observation that each communications medium "is a law unto itself," *Kovacs* v. *Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring), the rhetoric of this Court's First Amendment precedents has suggested that "the Constitution had to be reinvented with the birth of each new technology."[13]

A closer inspection of the substance of this Court's previous encounters with new technologies, however, reveals that the *Kovacs* "law-unto-itself" dicta has been more rhetoric than reality. By and large, this Court has tended to apply the same First Amendment standards that govern the traditional

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[12] *See* Robert Corn-Revere, *New Technology and the First Amendment: Breaking the Cycle of Repression*, 17 Comm/Ent 247, 264-265 (1994); M. Ethan Katsh, *The First Amendment and Technological Change: The New Media Have a Message*, 57 Geo. Wash. L. Rev. 1459, 1467-72 (1989).

[13] Laurence H. Tribe, *The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontier*, Keynote Address at the First Conference on Computers, Freedom & Privacy (Mar. 26, 1991).

press to almost every new medium it encountered. And even in those cases where this Court at first declined to extend full First Amendment protection to a new form of communication, full protection was eventually extended as society gained more experience with it.

The paradigm case in this regard is film. "The first motion pictures appeared in the late nineteenth century, and soon thereafter came the first incidents of censorship."[14] Yet when this Court considered the constitutional status of this new medium for the first time, it held that motion pictures were not speech and thus were not protected by the First Amendment. *Mutual Film Corp.* v. *Industrial Comm'n*, 236 U.S. 230, 244 (1915). It took almost four decades to reconsider this decision. But after cinema had become an established and accepted part of society, this Court began to extend to film the same degree of First Amendment protection accorded the traditional press. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 502-503 & n.13 (1952); *see also United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948). Although the Court acknowledged that "[e]ach method [of communication] tends to present its own particular problems," the Court firmly concluded that notwithstanding these differences "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule." *Joseph Burstyn, Inc.*, 343 U.S. at 503.[15]

As new media become more commonplace, this Court generally concludes that the "basic principles" underlying the First Amendment overshadow the "peculiar problems" that led initially to differential treatment. The main exception to this rule is broadcasting. In broadcasting, this Court determined that the inherent scarcity of transmission frequencies, *see Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 388-390 (1969), and the unique pervasiveness and accessibility of broadcasting, *see FCC* v. *Pacifica Found.*, 438 U.S. 726, 748-750 (1978), justified the imposition of significantly greater restrictions on broadcast speech than would be permitted on other media. *Cf. Sable Communications, Inc.* v. *FCC*, 492 U.S. 115 (1989) (rejecting imposition of indecency restrictions on telephony similar to those upheld in *Pacifica*); *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241 (1974) (rejecting imposition on newspapers of right of response similar to that upheld in *Red Lion*).

This Court's experience with creating a separate First Amendment standard for broadcasting, however, has not been a happy one. As this Court has openly acknowledged, both courts and commentators have challenged the scarcity rationale since its inception. *See Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 638 & n.5 (1994). Moreover, when faced with the full implications of Justice Jackson's approach in *Kovacs*, this Court appeared to shy away from creating new First Amendment standards for each new form of communication out of whole cloth and instead attempted to resolve cases through the use of competing analogies that weighed whether the new technology bore greater similarities with broadcasting or print. *See, e.g.*, *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983); *Sable Communications*, 492 U.S. at 127-128; *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) (Blackmun, J., concurring). As the analytical bases for *Red Lion* and *Pacifica* grew less defensible, attempts to decide cases by analogizing to them grew increasingly strained and arbitrary.

Finally, in *Turner Broadcasting*, this Court flatly disavowed the principle that a medium's distinct characteristics necessarily requires creating a new First Amendment *standard* under which restrictions on speech transmitted through that medium would be evaluated. As the Court concluded:

> [W]hatever relevance these physical characteristics may have in the evaluation of particular cable regulations, they do not require the

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[14] Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—From Anthony Comstock to 2 Live Crew*, 33 Wm. & Mary. L. Rev. 741, 761 (1992).

[15] *See also Freedman* v. *Maryland*, 380 U.S. 51, 58-61 (1965); *New York* v. *Ferber*, 458 U.S. 747, 771 (1982) (describing film as one of the "traditional forms of expression such as books" that must be protected as "pure speech").

> alteration of settled principles of our First Amendment jurisprudence.

512 U.S. at 639. In so holding, this Court returned to the original logic of *Joseph Burstyn, Inc.* by recognizing that although a medium's particular attributes might play an important role in the analysis of a particular problem (*e.g.*, what less restrictive measures might exist), those attributes should not change the fundamental First Amendment standards that would be applied.

Development of the Internet, "the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen," App. 141a, only confirms the wisdom of *Turner Broadcasting*. Transmission-based rationales such as scarcity, questionable from the beginning, have become increasingly meaningless. Print is now available via telephone, broadcast, cable, microwave transmission, and computer-based communication. Voice, once primarily carried through telephony, and moving images, once only conveyed via broadcast, are now available through virtually the all of the above-mentioned means as well. *See* Ithiel de Sola Pool, *Technologies of Freedom* 23 (1983).

Furthermore, the viability of distinctions based on the type of speech conveyed has also deteriorated as multimedia capabilities have grown increasingly sophisticated. It appears, for instance, that the only proper answer to the question whether the speech available on the Internet is more like the speech provided in print, mail, telephony, broadcasting, or cable is "all of the above." As the analytical coherence underlying these analogies has degenerated, their application has become increasingly unprincipled.

Recent technological developments have revealed a more fundamental flaw in acknowledging the possibility that different First Amendment standards may apply to different types of media. Although the incremental, case-by-case approach traditionally followed by this Court has proven adequate to deal with the rate of past technological change, the rapid increase in the rate of progress will soon outstrip the judiciary's ability to keep up, if it has not done so already. Moreover, uncertainty about the standard that will be applied to future communications technologies will undoubtedly

deter persons wishing to speak through those technologies from doing so until this Court has the opportunity to resolve the issue. As Justice Thomas so eloquently observed, the possibility that an emerging technology such as cable might be evaluated under a lower First Amendment standard "placed cable in a doctrinal wasteland in which regulators and cable operators alike could not be sure whether cable was entitled to the substantial First Amendment protections afforded the print media or was subject to the more onerous obligations shouldered by the broadcast media." *Denver Area Educ. Telecomms. Consortium* v. *FCC*, 116 S. Ct. 2374, 2420 (1996) (Thomas, J., concurring in the judgment in part and dissenting in part).

And even after this Court has established the standard that will govern a particular medium, the danger remains that technological changes will undermine the basis for the particular standard chosen long before this Court has the opportunity to revisit it. The gap that has developed between doctrine and reality will only expand further as the pace of technological change accelerates.[16]

To whatever extent this Court has not expressly rearticulated the basic principle of *Joseph Burstyn, Inc.* and *Turner Broadcasting* in subsequent cases, it at least has *applied* searching First Amendment scrutiny. Although the reasoning of the plurality opinion in *Denver* once again opened the possibility that a different First Amendment standard might apply to cable, 116 S. Ct. at 2384-85 (plurality opinion), the plurality nonetheless applied a standard very close to the strict scrutiny called for by traditional First Amendment doctrine, *id.* at 2385, 2391 (plurality opinion), and a majority of the Justices of this Court endorsed the application of established First Amendment principles to cable television, *id.* at 2404 (Kennedy, J., joined by Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 2419 (Thomas, J., joined by Rehnquist, C.J., &

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[16] Pool, *supra*, at 7; Rodney Smolla, *Free Speech in an Open Society* 321 (1992); Laurence H. Tribe, *American Constitutional Law* § 12-25, at 1007 (2d ed. 1986); Katsh, 57 Geo. Wash. L. Rev. at 1493.

Scalia, J., concurring in the judgment in part and dissenting in part).

What the *Denver* plurality did not appreciate fully is that failing to make clear that emerging media are governed by traditional First Amendment principles ultimately does more harm than declaring so. Although rapid changes in the technological, industrial, and regulatory environments made the plurality understandably reluctant to pronounce a categorical standard, these concerns underscore the importance of establishing that all emerging media will be evaluated under the same principles that govern traditional media. Unless this Court definitively reaffirms that there is only one First Amendment that is applicable to all forms of speech, it will be called upon repeatedly—and more frequently—to develop a "new" First Amendment standard with the emergence of each new medium. Speakers using new communications technology will face great uncertainty about the nature and extent of their rights and will be forced to await a decision of this Court before they are able to determine the degree of protection their speech will receive. A Court seeking to "do no harm" should not permit such a result. *See id.* at 2403 (Souter, J., concurring).

II. THE CDA UNCONSTITUTIONALLY ABRIDGES PROTECTED SPEECH AND THE INDECENCY STANDARD IS COMPLETELY VAGUE.

It is a well-established proposition that "[s]exual expression which is indecent but not obscene is protected by the First Amendment." *Sable Communications*, 492 U.S. at 126. But absent a clear understanding of the term "indecency," or of the doctrine that permits regulation of speech deemed by a designated decisionmaker to be "patently offensive," it is not entirely clear that such speech is protected in fact, or that constitutional protections for indecency exceed those extended to obscenity. Such questions are of critical importance to implementing the CDA, for unless the answers are clear, or even reasonably clear, to those who engage in online speech, it will be impossible to tell what speech must be screened from minors upon risk of criminal prosecution.

This is not simply a question of whether the indecency standard is impermissibly vague. Both as conceived and as

historically applied, it is. There is also a more fundamental question whether the indecency standard incorporates any kind of intelligible "test" that limits the breadth of the concept or restricts the discretion of prosecutors. Our history teaches that such unbridled regulation intrudes deeply into the area of protected speech.[17]

A. The Indecency Standard Is the Reincarnation of the *Hicklin* Rule in American Law.

1. The Lack of a Constitutionally Sound Test for Obscenity and Indecency Historically Led to the Routine Suppression of Serious Literary Works.

Despite the fact that obscene speech is unprotected by the First Amendment, this Court has long held that such communications may be penalized only if all three parts of the relevant test are met: (1) the average person, applying contemporary community standards, must find that the work, taken as a whole, appeals to the prurient interest in sex; (2) the work depicts or describes, in a patently offensive way, sexual conduct specifically described by state law; and (3) the work, "taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller* v. *California*, 413 U.S. 15, 24 (1973); *see also Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Massachusetts*, 383 U.S. 413, 418 (1966).[18] Even when the government asserts a need to protect minors from exposure to sexually oriented

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[17] Because the indecency standard is constitutionally infirm, the government's suggestion that the CDA can be reformed or narrowed is erroneous. *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 216-217 (1975). This Court could decide that the CDA can be applied constitutionally only to obscene speech, *Hamling* v. *United States*, 418 U.S. 87 (1974), but doing so would create a needless redundancy. *See, e.g.*, 18 U.S.C. § 1465. Accordingly, the CDA should be invalidated as a whole.

[18] In addition to substantive requirements, this Court also has imposed strict due process guidelines on obscenity enforcement so as not to chill the exercise of protected speech. *See, e.g.*, *Vance* v. *Universal Amusement Co.*, 445 U.S. 308, 316-317 (1980); *Freedman*, 380 U.S. at 57-58.

materials under a "variable obscenity" standard, the First Amendment prescribes strict limits based on the *Miller* test.[19]

The law was not always such. Before the courts rigorously applied First Amendment principles to obscenity laws, the relevant legal standard was drawn from an English case, *Regina* v. *Hicklin*, which held that the test for obscenity turned on whether the material tended to corrupt the morals of a young or immature person.[20] Under that standard, literature was judged obscene based upon a review only of brief excerpts of a publication and not the work as a whole.[21] Consequently, the intended audience of a book was unimportant if a young and inexperienced person might be exposed to the supposedly corrupting influence. Additionally, it was immaterial whether the book possessed literary merit. Indeed, some found that literary merit compounded the crime, by "enhancing a book's capacity to deprave and corrupt."[22]

Not surprisingly, under this test for obscenity, "[t]he first half of the 20th century [was] marked by heated litigation

[19] Well established First Amendment doctrine requires that material regulated under the "harmful to minors" standard must be "virtually obscene" before the government may adopt limited restrictions. *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383, 394 (1988); *accord American Booksellers* v. *Webb*, 919 F.2d 1493, 1504-05 (11th Cir. 1990), *cert. denied*, 500 U.S. 942 (1991); *American Booksellers Ass'n* v. *McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981) (statute prohibiting sale or display to minors of material containing nude figures held overbroad); *American Booksellers Ass'n* v. *Superior Ct.*, 181 Cal. Rptr. 33 (Ct. App. 1982) (photographs with a primary purpose of causing sexual arousal held not to be harmful to minors). Moreover, government must employ the least restrictive means of serving its interest.

[20] *Regina* v. *Hicklin*, 3 L.R.-Q.B. 360 (1868). The test focused not on the "average person in the community," but on "those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." *See* Meese Commission Report, *supra*, at 1246-47.

[21] Frederick F. Schauer, *The Law of Obscenity* 23 (1976).

[22] Edward de Grazia, *Girls Lean Back Everywhere* 12 (1992).

over books which are now generally regarded as classics."[23] Using the *Hicklin* rule, American courts held obscene such works as Theodore Dreiser's *An American Tragedy*,[24] D.H. Lawrence's *Lady Chatterley's Lover*,[25] Erskine Caldwell's *God's Little Acre*,[26] Radclyffe Hall's *The Well of Loneliness*,[27] Arthur Schnitzler's *Casanova's Homecoming*,[28] Henry Miller's *Topic of Cancer* and *Tropic of Capricorn*,[29] and James Joyce's *Ulysses*.[30]

In many cases, merely the threat of prosecution was sufficient to stop publication. By this method, publishers were persuaded to withdraw from circulation and destroy all outstanding copies of *Women in Love*, by D.H. Lawrence, *The Genius*, by Theodore Dreiser, and *Memoirs of Hecate County*, by Edmund Wilson.[31] Other literary greats that were attacked included Nathaniel Hawthorne, Walt Whitman, Ernest Hemmingway, Sinclair Lewis, Leo Tolstoy, Honore de Balzac, and George Bernard Shaw.[32]

Because of the adverse effect on important literary works, American courts began to question the *Hicklin* rule. As early as 1913, Judge Learned Hand asked whether "we are even

[23] Schauer, *supra*, at 23-24.

[24] *Commonwealth* v. *Friede*, 171 N.E. 472 (Mass. 1930).

[25] *People* v. *Dial Press*, 48 N.Y.S.2d 480 (Magis. Ct. 1944).

[26] *Attorney Gen.* v. *Book Named "God's Little Acre"*, 93 N.E.2d 819 (Mass. 1950).

[27] *People* v. *Friede*, 233 N.Y.S. 565 (Magis. Ct. 1929).

[28] *People* v. *Seltzer*, 203 N.Y.S. 809 (Sup. Ct. 1924).

[29] *United States* v. *Two Obscene Books*, 99 F. Supp. 760 (N.D. Cal. 1951), *aff'd sub nom. Besig* v. *United States*, 208 F.2d 142 (9th Cir. 1953).

[30] Not only was a small literary magazine convicted of obscenity for publishing *Ulysses* in installments, but the U.S. Post Office seized and burned all of the issues of the magazine. No American publisher considered printing *Ulysses* for the next eleven years. *See* de Grazia, *supra*, at 9-13, 16-17.

[31] *Id.* at 72-73, 710.

[32] Blanchard, 33 Wm. & Mary L. Rev. at 746, 758, 771.

today so lukewarm in our interest in letters or serious discussion as to be content to reduce our treatment of sex to the standard of a child's library," but nevertheless applied what he described as the "mid-Victorian morals" of *Hicklin* because it had been accepted by federal courts as the prevailing standard. *United States* v. *Kennerley*, 209 F. 119, 120-121 (S.D.N.Y. 1913). A significant break with *Hicklin* came in *United States* v. *One Book Entitled Ulysses*, 72 F.2d 705, 707-708 (2d Cir. 1934), where the Second Circuit declined to find the book *Ulysses* obscene when "taken as a whole" and after assessing its effect on the average member of the community. Other courts began to follow suit.[33] Despite this emerging trend, however, many publishers continued to shy away from books considered to be risky. For example, *Lady Chatterley's Lover*, written in 1928, was not published in its unexpurgated form in America until 1959.[34] *Tropic of Cancer*, written in 1934, was unpublished in the United States for 26 years.[35]

Finally, in 1957, this Court expressly abandoned the *Hicklin* rule and held that the First Amendment requires that works must be judged as a whole in their entire context, considering their effect on the average member of the community—not the most vulnerable. Moreover, a work could not be considered obscene if it possessed serious value. *Roth* v. *United States*, 354 U.S. 476, 489-490 (1957). That same year, this Court struck down a Michigan law that prohibited books containing "immoral, lewd [and] lascivious language * * * tending to the corruption of the morals of youth" because it "reduce[d] the adult population * * * to reading only what is fit for children." *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957).

As modified subsequently in *Memoirs* and *Miller*, this Court's categorical rejection of the *Hicklin* rule made clear

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[33] *E.g.*, *United States* v. *Levine*, 83 F.2d 156 (2d Cir. 1936); *ACLU* v. *City of Chicago*, 121 N.E.2d 585 (Ill. 1954), *appeal dismissed*, 348 U.S. 979 (1955); *People* v. *Viking Press, Inc.*, 264 N.Y.S. 534 (Magis. Ct. 1933).

[34] de Grazia, *supra*, at 94; *see Grove Press, Inc.* v. *Christenberry*, 276 F.2d 433 (2d Cir. 1960).

[35] de Grazia, *supra*, at 55, 370.

that the detailed analytical framework of a three-part test is essential to preserve First Amendment values and to separate protected from unprotected speech. Departure from that standard—as has occurred with the indecency standard—sacrifices important First Amendment values.

2. The Indecency Standard Is the Functional Equivalent of *Hicklin*.

The government defends the constitutional sufficiency of the indecency standard by stating that "[t]he CDA's definition of patently offensive materials is similar to the second element" of the *Miller* test for obscenity. Appellants' Br. at 48. The standard is consistent with the First Amendment, the government maintains, because "[m]aterial having scientific, educational, or news value *almost always* falls outside the CDA's coverage." *Id.* at 50 (emphasis added). This invitation to rely on the government's sense of restraint in applying a standardless test was too much for the court below to accept. As Judge Sloviter pointed out, this position "would require a broad trust indeed from a generation of judges not far removed from the attacks on James Joyce's *Ulysses* as obscene." App. 82a.

Indeed, the indecency standard articulated in *FCC* v. *Pacifica Foundation*, *supra*, and applied by the FCC in subsequent cases betrays this trust, and restores a level of government control over speech that existed before *Roth* and *Butler*. Just as under *Hicklin*, the indecency standard applies to selected passages, not to works as a whole; it is based not on the average person in a community, but upon children; and literary or artistic merit does not bar liability. In short, the three-part test that courts developed to ensure the application of First Amendment restraints on obscenity laws is precisely what the indecency standard lacks. Additionally, the CDA includes criminal penalties, creating a more serious constitutional problem than the administrative sanction at issue in *Pacifica*. *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

Although the government maintains that the relative "value" of speech is subsumed within the determination of "patent offensiveness," Appellants' Br. at 49-50, the FCC has held that the merit of a work is simply "one of many vari-

ables that make up a work's 'context.'"[36] Judge Patricia Wald has noted that "'[i]ndecency' is not confined merely to material that borders on obscenity—'obscenity lite.'" *Alliance for Community Media* v. *FCC*, 56 F.3d 105, 130 (D.C. Cir.) (in banc) (Wald, J., dissenting), *rev'd in part and aff'd in part sub nom. Denver Area Educ. Telecomms. Consortium* v. *FCC*, 116 S. Ct. 2473 (1996). Rather, the standard casts a larger net encompassing other, less offensive protected speech regardless of its merit. Thus, in many instances, "the programming's very merit will be inseparable from its seminal 'offensiveness.'" *Id.* The Commission has acknowledged that, because serious merit does not save material from an indecency finding, there is a "broad range of sexually-oriented material that has been or could be considered indecent" that does "not [include] obscene speech."[37]

Moreover, in applying the indecency standard, the FCC has expressly rejected claims that it must consider the suspect material as a whole,[38] and has penalized broadcasts where less than five percent of a program was devoted to sexually-oriented material. The Commission concluded that it could impose a fine "[w]hether or not the context of the entire [program] dwelt on sexual themes." *WIOD(AM)*, 6 FCC Rcd. 3704, 3705 (1989). Finally, like the discredited *Hicklin* rule, the focus of indecency regulation is the effect of sexually-oriented material on a vulnerable population—

[36] *Infinity Broadcasting Corp.*, 3 FCC Rcd. 930, 932 (1987), *aff'd in part and rev'd in part on other grounds sub nom. Action for Children's Television* v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988) ("*ACT I*").

[37] *Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 5 FCC Rcd. 5297, 5300 (1990), *rev'd on other grounds sub nom. Action for Children's Television* v. *FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 913 (1992).

[38] *Illinois Citizens Comm. for Broad.* v. *FCC*, 515 F.2d 397, 406 (D.C. Cir. 1974); *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 8 FCC Rcd. 998, 1004 (1993) ("We do not agree that any determination of indecency [on the cable medium] is required to take into account the work as a whole."). *Contra Erznoznik*, 422 U.S. at 211-212 n.7 ("Scenes of nudity in a movie, like pictures of nude persons in a book, must be considered as part of the whole work.").

children—and not average members of a community. *Pacifica*, 438 U.S. at 749-750. The net effect is to cancel the decades of constitutional evolution that made possible the protection of meritorious speech.

B. The Indecency Standard Is Unconstitutionally Vague.

The First Amendment requires that restrictions on speech be well-defined and unambiguous. Laws that inhibit free speech are subject to the most stringent standards of precision.[39] Vague laws attempting to regulate or suppress non-obscene speech have been repeatedly struck down,[40] even when enacted to protect minors. In *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U.S. 676, 678 (1968), this Court invalidated an ordinance requiring film classification and prohibiting attendance by youths under 16 at films classified "not suitable for young persons." *Interstate Circuit* established the principle that "the permissible extent of vagueness is not

[39] *Village of Hoffman Estates*, 455 U.S. at 499; *Cramp* v. *Board of Pub. Instruction*, 368 U.S. 278, 287 (1961); *see Hynes* v. *Mayor of Oradell*, 425 U.S. 610, 620 (1976) ("general test of vagueness applies with particular force in review of laws dealing with speech"); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 553 (1975) (condemning denial of access to a municipal theater where "the exercise of such authority was not bounded by precise and clear standards"); *Smith* v. *Goguen*, 415 U.S. 566, 574-575 (1974); *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972) (vague laws fail to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly"); *Gentile* v. *State Bar*, 501 U.S. 1030, 1051 (1991).

[40] *E.g.*, *Winters* v. *New York*, 333 U.S. 507, 518 (1948) (statutory standard interpreted by state court to be "criminal news or stories of deeds of bloodshed or lust, so massed as to become vehicles for inciting violent and depraved crimes"); *Joseph Burstyn, Inc.*, *supra* ("sacrilegious" as a licensing standard); *Gelling* v. *Texas*, 343 U.S. 960 (1952) (mem.) ("prejudicial to the best interests of the people of said City"); *Superior Films, Inc.* v. *Department of Educ.*, 346 U.S. 587 (1954) (mem.) ("moral, educational, or amusing and harmless"); *Holmby Prods., Inc.* v. *Vaughn*, 350 U.S. 870 (1955) (mem.) ("cruel, obscene, indecent or immoral, or such as tend to debase or corrupt morals").

directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children." *Id.* at 689.[41]

Vague laws impermissibly restrict speech in a variety of ways. First, without clear guidelines, those subject to a restriction cannot understand what is forbidden and what is not.[42] Second, a vague standard impermissibly chills speech, causing speakers to "steer far wider of the unlawful zone"[43] and to restrict their expression "to that which is unquestionably safe."[44] Third, restrictions on speech that lack clear limits give government officials far too much discretion to curb disfavored expression.[45] At bottom, the threat of prosecution grounded on vague standards constitutes a prior restraint.[46]

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[41] *See also Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 59 (1963) (condemning a commission that was charged with reviewing material "manifestly tending to the corruption of the youth"); *Rushia* v. *Town of Ashburnham*, 582 F. Supp. 900, 905 (D. Mass. 1983) ("The fact that a regulation is adopted for the purpose of protecting children does not cure vagueness.").

[42] *See, e.g., Kolender* v. *Lawson*, 461 U.S. 352, 357-358 (1983); *Grayned*, 408 U.S. at 108-109; *Gentile*, 501 U.S. at 1048 (regulation of speech is unconstitutional when those subject to it can do no more than "guess at its contours").

[43] *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958); *Bella Lewitzky Dance Found.* v. *Frohnmayer*, 754 F. Supp. 774, 783 (C.D. Cal. 1991).

[44] *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964); *see also Cramp, supra.*

[45] *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 133 (1992); *City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988); *City of Houston* v. *Hill*, 482 U.S. 451, 468-469 n.18 (1987); *Kolender*, 461 U.S. at 358, 360; *Thornhill* v. *Alabama*, 310 U.S. 88, 97 (1940).

[46] *Bantam Books*, 372 U.S. at 70; *Vance*, 445 U.S. at 316; *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 225-226 (1990) ("a scheme that places 'unbridled discretion in the hands of a government official or agency constitutes a prior restraint'") (quoting *City of Lakewood*, 486 U.S. at 757).

Contrary to the government's position in this case, *Denver* did not finally settle the vagueness question with respect to the CDA. The issue of the indecency standard's inherent vagueness has never been definitively resolved.[47] This Court's finding in *Denver* was focused on "a very particular context—congressional *permission* for cable operators to regulate programming that, but for a previous Act of Congress, would have had no path of access to cable channels free of an operator's control." 116 S. Ct. at 2386 (plurality opinion) (emphasis in original). The decision was predicated upon a "complex balance of interests," *id.* at 2387, that included the "First Amendment interests of cable operators and other [non-leased access] programmers," *id.* at 2386. Within the permissive framework of the very different law at issue in *Denver*, this Court assumed that cable operators would be prevented from applying an overly broad or vague standard because the law requires the screening of programs "only pursuant to a 'written and published policy.'" *Id.* at 2390 (plurality opinion) (citation omitted). No comparable constraint limits the CDA or the indecency concept.[48]

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[47] The discussion of vagueness in *Pacifica* was not endorsed by a majority of this Court. *Pacifica*, 438 U.S. at 743 (plurality opinion); *see id.* at 755-756 (Powell, J., concurring) ("The Court today reviews only the Commission's holding that Carlin's monologue was indecent 'as broadcast' at two o'clock in the afternoon, and not the broad sweep of the Commission's opinion."). Subsequent decisions have simply relied on *Pacifica* and thus have done nothing to clarify the indecency standard or resolve the vagueness issue. *E.g., Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1339 (D.C. Cir. 1988) ("*ACT I*"); *Carlin Communications, Inc.* v. *FCC*, 837 F.2d 546, 559 (2d Cir.), *cert. denied*, 488 U.S. 924 (1988) ("*Carlin III*"); *Action for Children's Television* v. *FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991) ("*ACT II*"), *cert. denied*, 503 U.S. 913 (1992); *Information Providers' Coalition for Defense of First Amendment* v. *FCC*, 928 F.2d 866, 874-875 (9th Cir. 1991); *Alliance for Community Media*, 56 F.3d at 129; *Action for Children's Television* v. *FCC*, 58 F.3d 654, 659 (D.C. Cir. 1995) ("*ACT III*"), *cert. denied*, 116 S.Ct. 701 (1996).

[48] In a February 1994 settlement agreement in an indecency case the FCC agreed to publish guidelines as to the meaning of the term "indecency" within 9 months. *Evergreen Media Corp.* v. *FCC*, Civil No. 92 C 5600 (N.D. Ill. Feb. 22, 1994). This clarification of the Commission's indecency standard has not been produced.

1. The Government and Supporting Amici Demonstrate the CDA's Vagueness.

The briefs filed by the government and supporting Amici are Exhibit A for the proposition that the indecency standard is unconstitutionally vague. Any person who might have been tempted to suggest that he or she understood the indecency concept when the CDA was passed would be at a total loss upon reviewing its defense before this Court. The five briefs filed with this Court in support of the CDA articulate at least five different views as to the meaning of indecency and the permissible scope of governmental authority for its regulation.

Whereas the Solicitor General takes the position that indecent speech may be regulated as if it were a "secondary effect," and the CDA's restrictions may be characterized as content-neutral "cyberzoning" regulations, Appellants' Br. at 36-37, the congressional amici claim that the standard for "online indecency" is far more speech protective than even the "harmful to minors" standard, Br. of Members of Congress ("Cong. Br.") at 8. The congressional brief asserts that the standard for online speech is "more permissive than broadcast indecency," and does not restrict anything one may display on one's jacket in public,[49] a public billboard,[50] at school,[51] or on cable television,[52] *id.* at 6 & n.4, while

[49] *E.g.*, *Cohen* v. *California*, 403 U.S. 15 (1971) ("Fuck the Draft"); *cf. Lewis* v. *City of New Orleans*, 415 U.S. 130 (1974); *Gooding* v. *Wilson*, 405 U.S. 518 (1972).

[50] *Cf. Erznoznik*, *supra* (films containing nudity).

[51] *Papish* v. *Board of Curators*, 410 U.S. 667 (1973) (per curiam) (indecency sanction reversed for dissemination of campus newspaper, available to high school seniors, that depicted policemen raping Statue of Liberty and Goddess of Justice with caption "M----- F----- Acquitted").

[52] *Denver*, 116 S. Ct. at 2390 (non-obscene images of "oral sex, bestiality, and rape"); *Community Television, Inc.* v. *Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985), *aff'd sub nom. Jones* v. *Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff'd mem.*, 480 U.S. 926 (1987) (uncut R-rated movies); *cf.* Appellants' Br. at 43 (material "similar to the R-rating for movies" should be screened from minors).

Morality in Media advocates an "indecency for all" standard that would limit the level of discourse to that permitted in a school assembly,[53] Morality in Media Br. at 6-7, 13-16. The Family Life Project cites the George Carlin monologue made famous in *Pacifica* as the operational definition of indecency, a concept it maintains extends to any speech that does not conform "with accepted standards of morality." Fam. Life Proj. Br. at 27 (quoting *Pacifica*, 438 U.S. at 740). Enough is Enough equates "indecency" with "pornography" without elaborating on the legal standard, except to suggest that it is broad enough to criminalize "airbrushed sexual images of women." Enough is Enough Br. at 8 n.8, 11-12 n.16.

Nothing in these briefs remotely resembles a standard that an individual could use to ensure compliance with the law. Instead, law enforcement authorities and individuals are admonished to judge speech by employing a "host of variables" in which merit is not dispositive. *E.g.*, Cong. Br. at 9 n.10, 13; Appellants' Br. at 49-50. Congressional amici propose a new standard labeled "online indecency" and list at least eight variables to consider. Cong. Br. at 14. How this standard might actually be applied is anyone's guess.

2. Experience with Indecency Enforcement Demonstrates the Standard's Vagueness and Overbreadth.

Apart from those cases that have commented on the generic language of the indecency test,[54] there is no body of case law interpreting the standard, since no broadcaster has "held out long enough" through the administrative process to have a particular enforcement order tested in court.[55] The CDA's supporters cannot even agree on the relevance of existing

[53] *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675 (1986) (penalizing student speech that included double entendre).

[54] *See supra* note 47.

[55] *Action for Children's Television* v. *FCC*, 59 F.3d 1249, 1254 (D.C. Cir. 1995) ("*ACT IV*"), *cert. dismissed*, 116 S. Ct. 773 (1996); *see also id.* at 1264 (Tatel, J., dissenting) ("of the thirty-six FCC indecency forfeiture orders issued since 1987, not one has been reviewed by a court").

FCC indecency regulations to the current proceeding.[56] Nevertheless, the court below found that FCC administrative decisions at least "provide a kind of surrogate insight" into the scope of the standard. App. 119a.

Comparing the FCC's indecency orders to similar judicial decisions (in which more rigorous First Amendment tests apply) provides a benchmark by which to assess the government's claim that the indecency standard does not suppress speech "with serious redeeming value." Appellants' Br. at 50. For example, this Court found that the R-rated film *Carnal Knowledge* "could not be found under the *Miller* standards to depict sexual conduct in a patently offensive way." *Jenkins* v. *Georgia*, 418 U.S. 153, 161 (1974). The film is about friends who are "preoccupied with their sex lives" and it includes scenes in which "sexual conduct including 'ultimate sex acts' is to be understood to be taking place" as well as "occasional scenes of nudity." *Id.* at 158, 161. This Court made clear, however, that "nudity alone is not enough to make material legally obscene under the *Miller* standards." *Id.* at 161.

Pacifica, however, is an entirely different matter. In the FCC's only substantive ruling on a theatrical film, it concluded that the R-rated film *Private Lessons* was indecent.[57] As the Commission explained in a press statement, *Private Lessons* "included nudity and scenes depicting sexual matters which were dealt with in a pandering and titillating manner." It added that the 15-year-old protagonist's pursuit of sex, "together with the inclusion of explicit nudity, would have commanded the attention of children." Although the FCC

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[56] *Compare* Appellants' Br. at 50 (citing FCC cases) *with* Cong. Br. at 7 (the indecency restriction of the CDA "differs markedly from broadcasting law").

[57] *See* FCC News Release, "KZKC(TV), Kansas City, MO, Apparently Liable for $2,000 Fine for Indecent Broadcast" (June 23, 1988). The Commission stayed the proceeding shortly thereafter due to judicial review of its indecency policy, and no substantive decision ever issued. *See Kansas City Television, Ltd.*, 4 FCC Rcd. 7653 (1988); *see also* Appellants' Br. at 43 (a tagging system "similar to the R-rating for movies" could be used to identify online indecency).

tended to describe the subject matter of *Private Lessons* in more pejorative terms than did this Court in discussing *Carnal Knowledge*, an independent review of the two films found their respective depictions of sexual matters and nudity to be virtually identical.[58]

Although the movies might be distinguished based on their "quality," it is by no means certain how this concept might be applied as a matter of law. In any event, such questions appear to have made little difference to the FCC, judging by its investigation for indecency of the BBC-produced, Peabody Award-winning mini-series, *The Singing Detective*. The critically-acclaimed program was aired by various public television stations between 1988 and 1990, and a year-long FCC investigation ensued after the program appeared on a KQED-TV in San Francisco in 1990. The Commission's review did not consider the full seven hours of the program, but instead focused on several short scenes that included nudity and one scene in which a child witnessed a sexual encounter. The FCC never formally resolved the complaint, and simply let the matter fade away after putting the TV station through the trouble of defending its actions. The episode demonstrates that, just as under the *Hicklin* rule, a successful prosecution is not needed in order to suppress speech.[59]

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[58] *See* Craig Hosoda, *The Bare Facts Video Guide* 647, 817 (1995). In *Jenkins*, this Court consulted film reviews in order to obtain more information about the film under review. 418 U.S. at 158-159.

[59] *See* Robert Corn-Revere, *New Age Comstockery*, 4 CommLaw Conspectus 173, 181-182 (1996); *see also Pacifica*, 438 U.S. at 741 n.16 (even if *Lady Chatterley's Lover*, when taken as a whole, is not obscene, "the utterance of such words or the depiction of such sexual activity on radio or TV would raise * * * public interest and section 1464 questions") (quoting *En Banc Programming Inquiry*, 44 F.C.C. 2303, 2307 (1960)). *But cf. Kingsley Int'l Pictures Corp.* v. *Regents*, 360 U.S. 684, 688-689 (1959) (invalidating, on First Amendment grounds, licensing restriction directed at film *Lady Chatterley's Lover* because it "portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of [the] citizenry"). The FCC has been reluctant to get into questions of literary merit, and, despite the existence of supporting judicial precedent, declined to issue a

Despite this Court's repeated findings that nudity *per se* is not patently offensive, even as to minors,[60] it is clear that the FCC, Congress, and the Department of Justice believe otherwise. The FCC, for example, has asserted that "the televising of nudes might well raise a serious question of programming contrary to 18 U.S.C. § 1464."[61] Similarly, in the Telecommunications Act of 1996, Congress specifically added "nudity" to the list of proscribable "indecent" programming on public and leased access channels.[62] Although congressional amici now disclaim any intent to impose a similar interpretation under the CDA on the theory that "online indecency" is "more permissive than broadcast indecency," Cong. Br. at 6, the Department of Justice and the Solicitor General are operating under a quite different assumption. *See supra* notes 9, 56; *see also ACLU* v. *Reno*, 24 Media L. Rep. (BNA) 1797 (E.D. Pa. May 15, 1996) clarifying TRO to block enforcement of CDA against "centerfold" type images).

Perhaps most threatening is the application of the indecency standard to news programming. The FCC has expressly declined to hold that "if a work has merit it is *per se* not indecent," and that material may be found indecent for broadcast even where the information is presented "in the news" and is presented "in a serious, newsworthy manner."[63] The government suggests nevertheless that material with

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declaratory ruling that a reading from *Ulysses* is not indecent. *See William J. Byrnes, Esq.*, 63 Rad. Reg. 2d (P&F) 216 (Mass Media Bureau 1987).

[60] *Erznoznik*, 422 U.S. at 213; *Jenkins*, 418 U.S. at 161; *Kois* v. *Wisconsin*, 408 U.S. 229 (1972); *Manuel Enters., Inc.* v. *Day*, 370 U.S. 478 (1962).

[61] *En Banc Programming Inquiry*, 44 F.C.C. at 2307; *Pacifica*, 438 U.S. at 741 n.16.

[62] *See* Telecommunications Act of 1996, § 506, 47 U.S.C. § 531; *see also* 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992) (statement of Sen. Helms) (listing as examples of "indecency" scenes of "men and women stripping completely nude").

[63] *Letter to Merrill Hansen*, 6 FCC Rcd. 3689, 3689 (1990) (citation omitted); *see also KLOL(FM)*, 8 FCC Rcd. 3228 (1993); *WVIC-FM*, 6 FCC Rcd. 7484 (1991).

"serious redeeming value" is not affected by this approach, and that programming with news value "almost always falls outside the CDA's coverage." Appellants' Br. at 50. To support this claim, the government cites an FCC dismissal of an indecency complaint against an NPR newscast in which a "reputed Mafia figure used an expletive repeatedly in conversation." Appellants' Br. at 50 (citing *Letter to Mr. Peter Branton*, 6 FCC Rcd. 610 (1991), *petition for rev. dismissed*, 993 F.2d 906 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 1610 (1994)). While there is no question about the correctness of the decision in that case, the example raises more questions than it answers about how the government might apply the "host of variables" that separate innocence from criminality.

As a guideline to help determine "patent offensiveness," the government suggests that speakers should consider context (the kind of program on which speech appears) and degree (not "an occasional expletive"). Appellants' Br. at 49 (quoting *Denver*, 116 S. Ct. at 2390 (plurality opinion)). However, the "occasional expletive" rule did not prevent the FCC from imposing a fine on a radio station whose employees read a portion of a *Playboy* magazine interview on the air in which Jessica Hahn described being raped by Reverend Jim Bakker. *Letter to Merrill Hansen*, *supra*. The Commission agreed that "the newsworthy nature of broadcast material" was a "relevant contextual consideration[]," but it nevertheless concluded, without discussion, that the presentation was "pandering." *Id.*[64] On the other hand, the Commission exonerated the NPR broadcast in *Branton* despite the fact that, as former FCC Commissioner Ervin S. Duggan wrote in dissent, it transmitted "in the course of a few seconds ten repetitions of the dirtiest of 'the seven dirty words.'"[65] The Commissioner concluded that "such deliber-

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[64] Judge Patricia Wald has questioned the FCC's characterization of this case. *ACT III*, 58 F.3d at 685 (Wald, J., dissenting). She concluded that "this one case exemplifies so well * * * that enforcement of [the FCC's] indecency regulation involves both government- and self-censorship of much material * * * *"

[65] *Branton*, 6 FCC Rcd. at 611 (Duggan, Comm'r, dissenting). He described the word in question as "the one expletive that has traditionally been considered the most objectionable, the most

ate and repeated use, in my judgment, however noble the intent of the broadcaster, seems to me to fit the definition of pandering: catering to low tastes." *Id.*

Given the government's ability to ignore or manipulate its own "factors" to determine patent offensiveness, these cases demonstrate that "indecency" is the very paradigm of a vague and arbitrary test. Commissioner Duggan, for example, suggested that his fellow Commissioners may have been persuaded not to issue a sanction in *Branton* "because the broadcast in question was by National Public Radio." *Id.*[66] Such an ability to assist favored speakers and penalize disfavored ones is the principal vice for which the vagueness doctrine was created, *Kolender*, 461 U.S. at 360, and it is particularly threatening to publishers such as Playboy, which, the Meese Commission acknowledged, has been the target of government "mistakes," *see supra* p. 4.

The lack of any principled basis for applying the "host of variables" subsumed within the concept of indecency also means that there is no way to predict the outcome of the next case, except to conclude that "merit" is not dispositive. If Commissioner Duggan had been a federal judge charged with enforcing the CDA, it is quite likely that NPR would have been found criminally liable for transmitting an indecent newscast. It is sobering to realize in this regard, that in *Gillett Communications* v. *Becker*, 807 F. Supp. 757 (N.D. Ga. 1992), *appeal dismissed mem.*, 5 F.3d 1500 (11th Cir. 1993), a federal district court held that the videotape *Abortion in America: The Real Story*, transmitted as part of a political advertisement by a bona fide candidate for public office, was indecent. As the late Justice William O. Douglas warned, "[h]ighly subjective inquiries such as this do not lend themselves to a workable or predictable rule of law, nor should they be the basis of fines or imprisonment." *Kois*, 408 U.S. at 232 (Douglas, J., concurring). Failure to heed this warning provides a vehicle "for the suppression of any unpopular tract." *Id.* at 233.

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forbidden, and the most patently offensive to civilized and cultivated people: the famous F-word." *Id.*

[66] It is conceivable that similar considerations persuaded the FCC to "misplace" the complaint involving *The Singing Detective*.

All of our experience with the indecency standard belies the government's claim that the CDA does not threaten speech with serious merit. It cannot be reconciled with the demands of the First Amendment. Accordingly, this Court should uphold the decision below that the indecency standard is constitutionally infirm.

CONCLUSION

For the foregoing reasons, and for those set forth in the appellees' briefs, the judgment below should be affirmed.

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No. 96-511

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Appellants,

vs.

AMERICAN CIVIL LIBERTIES UNION, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF AMICI CURIAE OF SITE SPECIFIC, INC., AND JON LEBKOWSKI IN SUPPORT OF APPELLEES

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INTEREST OF THE AMICI CURIAE*

Site Specific, Inc. and Jon Lebkowsky respectfully submit this brief as *amici curiae* in support of appellees' assertion that the three-judge district court correctly determined that the Communications Decency Act of 1996 was unconstitutional.

Jon Lebkowsky is a freelance writer and online activist based in Austin, Texas. He hosts a weekly forum for activists at Hot Wired's www.talk.com and the Austin conference at Electric Minds (www.minds.com), and is currently working on a book for MIT Press. Lebkowsky also writes and distributes a periodic column, *Cyberdawg Barking*, exclusively via the Internet, reaching a potential audience of millions at minimal expense. He uses the column to communicate his ideas on freedom of speech, politics, and policy matters concerning the Internet. As an Internet-based writer, Lebkowsky hopes that this Court will recognize that he and numerous other writers depend on the Internet as a democratic, inexpensive print medium, and accord it appropriate protection.

Site Specific, Inc. is a New York corporation specializing in building interactive brands and businesses. Its services include strategic Internet consulting, web site and banner development, media planning and buying, and content licensing and syndication. Site Specific, as a "new media" company, has much in common with more traditional design companies, consulting and advertising agencies, which perform their services in the well-settled legal environment pertaining to print media. It believes that if this Court recognizes the analogy between the Internet and traditional print media, it will promote the growth and stability of new media. In addition, Site Specific's Chief Technology

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* Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

Officer, Clay Shirky, is a writer who relies on the Internet as one means of distributing his thoughtful essays on the meaning of the Internet as a new medium. Like *amicus* Lebkowsky, Mr. Shirky utilizes the Internet heavily as a print medium.

Both *amici* depend on the Internet for their livelihood and for communicating with clients and colleagues. Both *amici* urge this Court to clarify and stabilize the legal rules applicable to the Internet by according speech on the Internet the highest protection accorded speech in any medium. To do so, the Court should acknowledge the essential similarity between the Internet and print media.

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

The Communications Decency Act of 1996 ("CDA"), 47 U.S.C. §§ 223(a)-(h), is an intrusive government regulation of constitutionally protected speech, fashioned in apparent ignorance of the technological medium it was intended to regulate. We join with appellees to urge affirmance of the judgment below holding that the CDA is unconstitutionally vague and overbroad. We file this brief, however, to urge this Court to focus on an issue the plurality deferred in *Denver Area Educational Telecommunications Consortium v. F.C.C.*, ___ U.S. ___, 116 S. Ct. 2374, 2385 (1996) ("*Denver*"): selecting "one analogy or specific set of words now" that will govern a new communications medium. We respectfully disagree with the *Denver* plurality's conclusion that it is both possible and desirable to determine *how* to treat a new medium without first determining *what* it is. In the past, this Court has walked on firmer ground when it determined the proper legal regime for new media by seeking the correct analogy. We believe there is no proper alternative but to do so here.

This Court should recognize that print media are the proper analogy for the Internet. Like print, the Internet is a means for the replication, storage and transmission of huge amounts of text of every description and on every topic. The Internet is like a giant library of all human knowledge, and imposing broadcast-style indecency regulations would have the same profoundly

destructive effects as such standards would have if imposed upon the Library of Congress. Only by recognizing the analogy between the Internet and print media will this Court assure the appropriate protection of the medium likely to become the main conduit for personal, political and creative speech in the next century.

Confusion over the proper analogy for the Internet has led to a wide variety of contradictory and legally infirm actions in state legislatures and in the courts, including numerous state laws regulating content, and the prosecution of individuals for speech which would clearly be protected in print. Only by issuing a clear ruling that the Internet is analogous to print media can this Court assure the development of a stable legal regime. Stability will promote the growth of this infant medium, while the application of broadcast-style rules will stifle the Internet's maturation.

Therefore, we join appellees in requesting this Court to affirm, but we urge that it eliminate legal confusion by specifically declaring that the Internet, in its current form, is analogous to, and should for First Amendment purposes be treated like, print media.

ARGUMENT

I. THE TIME IS RIPE FOR THIS COURT TO SELECT THE CORRECT ANALOGY FOR CYBERSPACE.

For a court to consider the proper legal regime for a new communications medium, it is essential that it first select an appropriate analogy to prior media. A decision not founded on analogical reasoning runs the risk of misapprehending the social significance of a new technology, and therefore applying the wrong rule.

In *Technologies of Freedom*, communications scholar Ithiel de Sola Pool traced the process used by this Court and others in

the nineteenth century to resolve disputes pertaining to the telegraph and telephone:

> Courts like to treat new phenomena by analogy to old ones. When the telephone was invented, the question was whether, at law, the telephone was a new kind of telegraphy or something different. If the phone was a telegraph, a body of law already existed that would apply. The decisions sometimes went one way, sometimes the other; but the model of the telegraph was always there to be considered.

Ithiel de Sola Pool, *Technologies of Freedom* 100 (1983).

Benjamin Cardozo, in his seminal lectures on the Nature of the Judicial Process, described the value of what he called the "method of analogy":

> I do not mean that the directive force of history, even when its claims are most assertive, confines the law of the future to uninspired repetition of the law of the present and the past. I mean simply that history, in illuminating the past, illuminates the present, and in illuminating the present, illuminates the future.

Benjamin Cardozo, *The Nature of the Judicial Process* 53 (1921). Quoting Maitland, he continued: "Today we study the day before yesterday, in order that yesterday may not paralyze today, and today may not paralyze tomorrow." *Id.* at 54.

Blacks Law Dictionary defines analogy as "[i]dentity or similarity of proportion, where there is no precedent in point." It continues:

> In cases on the same subject, lawyers have recourse to cases on a different subject-matter, but governed by the same general principle. This is reasoning by analogy. The similitude of relations which exist between things compared."

Black's Law Dictionary (6th ed.) 84 (1990).

Analogical reasoning is a fundamental approach by which lawyers compare new matters, including technology, to old ones in order to determine which legal rules should apply. Reasoning by analogy is "the central feature of the common law method, prevalent of course in American constitutional law." Cass Sunstein, *On Analogical Reasoning*, 106 Harv. L. Rev. 741, 781 (1993).

> [It] has the advantage, for ordinary lawyers and judges, of humility and circumspection, [and it] may be particularly desirable in contexts in which we seek moral evolution over time. . . . Analogical reasoning has the advantage of allowing a large degree of openness to new facts and perspectives. It enables disagreement and uncertainty to turn into consensus.

Id. at 782.

Likewise, Professor Tribe addressed the manner in which courts treat new technologies:

> Our constitutional law evolves through judicial interpretation, case by case, in a process of reasoning by analogy from precedent. At its best, that process is ideally suited to seeing beneath the surface and extracting deeper principles from prior decisions.

Lawrence H. Tribe, *The Constitution in Cyberspace, Opening Address at the First Conference on Computers, Freedom and Privacy* (March 26, 1991), available online at: *gopher://gopher.cpsr.org/00/cpsr/conferences/cfp91/transcripts/tribe.txt*.

Finally, Professor Kalven similarly urged some thirty years ago that the law pertaining to a new communications medium should be "determined by a choice between competing analogies." Harry Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. Law and Econ. 15, 38 (1967).

This Court has usually adopted such an approach and has searched for the appropriate analogy in determining the proper legal regime for a new technology. In *Primrose v. Western Union Telegraph Co.*, 154 U.S. 1 (1894), this Court selected the

railroad as the appropriate analogy for the telegraph, thus determining a progeny of precedents to follow. In applying analogical reasoning, *Primrose* recognized:

> Telegraph companies resemble railroad companies and other common carriers, in that they are instruments of commerce, and in that they exercise a public employment, and are therefore bound to serve all customers alike, without discrimination.

Id. at 14.

The issue arose, as well, when the telephone was in its infancy, and many courts chose to apply jurisprudence developed for the telegraph. *See, e.g., Northwestern Tel. Exch. Co. v. Chicago, M. & St. P. Ry. Co.*, 76 Minn. 334, 79 N.W. 315, 317 (1899) ("The rule is well established that in applying the principles of the common law or in construing statutes the telephone is to be considered a telegraph"); *Hudson River Tel. Co. v. Watervliet Turnpike & Ry Co.*, 135 N.Y. 393, 32 N.E. 148, 149 (1892) (applying statutes authorizing telegraph transmission to telephone); *Attorney General v. Edison Telephone Co.*, 6 Q.B.D. 244 (1880) (same); *See also, Duke v. Central New Jersey Telephone Co.*, 21 A. 460 (N.J. 1891) (The telephone is a "novel method for accomplishing the object for which telegraphs were erected"); *But see Chicago Telephone Co. v. Postal Telegraph-Cable Co.*, 285 Ill. 411, 120 N.E. 795, 799 (1918) (Carter, J., dissenting) ("Telegraph companies are as distinct from telephone companies as a railroad company is distinct from a steamboat company").

However, when a court fails to use analogical reasoning and attempts to regulate a new technology without the guidance of history, it risks creating bad law. In *City of Richmond v. Southern Bell Telephone & Telegraph Co.*, 174 U.S. 761 (1899), for example, this Court rejected the obvious parallel between telephone and telegraph:

> Governmental communications to all distant points are almost all, if not all, in writing. The useful government privileges which formed an important element in the

> legislation would be entirely inapplicable to telephone lines, by which oral communications only are transmitted. . . . [T]elegraphy and telephony have different significations. . . .

Id. at 776.

Determinations based upon the failure to utilize analogical reasoning are almost always eroded over time or reversed later, but may cause harm in the intervening years. For example, when this Court first considered the applicability of the First Amendment to the newly created technology of motion pictures in *Mutual Film Corp. v. Industrial Comm. of Ohio*, 236 U.S. 230 (1915), it distinguished them from the press and denied them protection on the grounds they were "a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded . . . as part of the press of this country, or as organs of public opinion." *Id.* at 244.

Then, in 1952, in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), the Court reversed itself, recognizing the analogy between movies and printed matter:

> That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures.

Id. at 501. The Court went on to recognize a need for consistency among the treatment of varying media: "Each method [of communication] tends to present its own peculiar problems. But the basic principle of freedom of speech and of the press, like the First Amendment's commandments, do not vary." *Id.* at 503.

In *Leathers v. Medlock*, 499 U.S. 439 (1991), Justices Marshall and Blackmun more recently expressed a similar view: "Although cable television transmits information by distinctive

means, the information service provided by cable does not differ significantly from the information services provided by . . . newspapers, magazines, television broadcasters, and radio stations." *Id.* at 457 (Marshall, J., joined by Blackmun, J., dissenting).

In other words, to attain consistency of First Amendment outcomes, the courts and the legislatures should treat the method of storage or transmission as irrelevant, and focus instead upon the information itself.

The law of copyright furnishes several significant examples of undesirable outcomes when courts failed to follow this approach. For example, this Court originally failed to recognize the similarity of piano rolls to sheet music, *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908), and a district court misapprehended the analogy between software stored in ROM and software stored on disk, *Apple Computer, Inc. v. Franklin Computer Corp.*, 545 F. Supp. 812 (E.D. Pa. 1982), *rev'd*, 714 F.2d 1240 (3d Cir. 1984). Such cases demonstrate how courts can impede the development of an emerging technology by failing to analogize it to an existing medium.

Professor Zechariah Chafee, perhaps the greatest First Amendment scholar of the first half of the 20th Century, also warned of the consequences of ignoring the parallels among different forms of communication:

> Newspapers, books, pamphlets and large meetings were for many centuries the only means of public discourse, so that the need for their protection has long been generally realized; on the other hand, when additional methods for spreading facts and ideas were introduced or greatly improved by modern invention, writers and judges had not got into the habit of being solicitous about guarding their freedom. And so we have tolerated censorship of the mails, the importation of foreign books, the stage, the motion picture and the radio.

Zechariah Chafee, *Free Speech in the United States*, 381 (1941).

Notwithstanding the effectiveness of analogical reasoning and the judicial success stories associated with it, many courts are still reticent to apply this approach to emerging technologies today. As recently as last year, the *Denver* plurality declined to identify an appropriate analogy for cable television:

> [N]o definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard, good for now and for all future media and purposes. . . . Rather, aware as we are of the changes taking place in the law, the technology, and the industrial structure, related to telecommunications, we believe it unwise and unnecessary to pick one analogy or one definitive set of words now.

Id. at 2385 (citations omitted).

As Justices Kennedy and Ginsburg noted, the plurality erred in declining to identify the correct analogy for cable, and thereby missed an important decisional opportunity:

> The [plurality] opinion treats concepts such as public forum, broadcaster, and common carrier as mere labels rather than as categories with settled legal significance; it applies no standard, and by this omission loses sight of existing First Amendment doctrine. When confronted with a threat to free speech in the context of an emerging technology, we ought to have the discipline to analyze the case by reference to existing elaborations of constant First Amendment principles.

Id. at 2404 (Kennedy, J., joined by Ginsburg, J., concurring in part, concurring in the judgement in part and dissenting in part). They further asserted that the "creation of standards and adherence to them, even when it means affording protection to speech unpopular or distasteful, is the central achievement of our First Amendment jurisprudence." *Id.* at 2406. The use of analogy is a "responsibility," rather than the "luxury" the plurality considered it to be. *Id.* at 2407. They concluded as follows:

> Another troubling aspect of the plurality's approach is its suggestion that Congress has more leeway than usual to enact restrictions on speech when emerging

> technologies are concerned, because we are unsure what standard should be used to assess them. Justice Souter recommends to the Court the precept, "First, do no harm". . . . The question, though, is whether the harm is in sustaining the law or striking it down. If the plurality is concerned about technology's direction, it ought to begin by allowing speech, not suppressing it.

Id. at 2407.

Justice Souter, in his *Denver* concurrence, expressed concern that finding an analogy for cable might improperly predispose courts to decide cases from other technologies in the same way:

> [A]s broadcast, cable, and the cyber-technology of the Internet and the World Wide Web approach the day of using a common receiver, we can hardly assume that standards for judging the regulation of one of them will not have immense, but now unknown and unknowable, effects on the others.

Id. at 2402 (Souter, J., concurring).

This "cyber-technology of the Internet and the World Wide Web" is before the Court right now. To delay analogical reasoning further because of the possibility of a later technological convergence would be, we submit, a serious error, especially because it is unclear whether that convergence will quickly occur. In fact, the vision of the Information Superhighway as culminating in a television set with a communications box on top is still uncertain, while the Internet thrives as a network culminating in a desktop PC. *See generally* Steven Levy, "How the Propeller Heads Stole the Electronic Future," *New York Times Sunday Magazine* (September 24, 1995) 58.

Pressing and controversial issues pertaining to speech on the Internet demand an immediate, clear and comprehensive resolution. Confusion over the applicability of the First Amendment to the Internet has already led to a plethora of inconsistent results and highly invasive federal and state legislation. In order to bring this case to complete closure, direct the courts in the resolution of future disputes, and guide Congress and the states in

future policy making, it is imperative that this Court select the proper analogy for cyberspace.

As Justice Souter said in his concurrence in *Denver*, a strict categorical approach "keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said." 116 S. Ct. at 2401. *See, e.g.*, Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 Colum. L.Rev. 449, 474 (1985) (courts "should place a premium on confining the range of discretion left to future decisionmakers who will be called upon to make judgments when pathological pressures are most intense").

II.

THE PROPER ANALOGY FOR CYBERSPACE IS PRINT.

The district court below expressly found:

> Evidence adduced at the [preliminary injunction] hearing showed significant differences between Internet communications and communications received by radio or television. Although content on the Internet is just a few clicks of a mouse away from the user, the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial.

ACLU v. Reno, 929 F. Supp. 824, 845 (E.D.Pa 1996). In addition, although Chief Judge Sloviter compared the Internet to the telephone system, *id.* at 851, she also drew the parallel to print media:

> When Congress decided that material unsuitable for minors was available on the Internet, it could have chosen to assist and support the development of technology that would enable parents, schools, and libraries to screen such material from their end. It did not do so, and thus did not follow the example available in the print media where non-obscene, but indecent and patently offensive books and magazines abound.

Id. at 857. Thus, the chief judge would, at the very least, look to solutions historically proven to work for the print media and apply them to problems on the Internet.

By contrast, Judge Dalzell found the Internet to be a "far more speech-enhancing medium than print, the village green, or the mails," *id.* at 882, because of four related characteristics of "transcendent importance":

> First, the Internet presents very low barriers to entry. Second, these barriers to entry are identical for both speakers and listeners. Third, as a result of these low barriers, astoundingly diverse content is available on the Internet. Fourth, the Internet provides significant access to all who wish to speak in the medium, and even creates a relative parity among speakers.

Id. at 877. By comparison, print media accomplish none of these goals, and he asserted that unwise, unconstitutional restrictions on the Internet will ultimately reduce it to the current level of print media and broadcasting:

> In this respect, the Internet would ultimately come to mirror broadcasting and print, with messages being tailored to a mainstream society from speakers who could be sure that their message was likely decent in every community in the country. * * * This change would result in an Internet that mirrors broadcasting and print, where economic power has become relatively coterminous with influence.

Id. at 878-79.

Judge Dalzell cautioned that "[w]e should also protect the autonomy that such a medium confers to ordinary people as well as media magnates." *Id.* at 882. Consequently, he would place the Internet on an even higher First Amendment pedestal than print or broadcast media:

> My examination of the special characteristics of Internet communication, and review of the Supreme Court's medium-specific First Amendment jurisprudence, lead me to conclude that the Internet deserves the broadest possible protection from government imposed, content-based regulation. If "the First Amendment erects a virtually insurmountable barrier between government and the print media," [*Miami Herald Publishing Co. v.*] *Tornillo*, 418 U.S. [241,] 259 (White, J., concurring), even though the print medium *fails* to achieve the hoped-for diversity in the marketplace of ideas, then that "insurmountable barrier" must also exist for a medium that *succeeds* in achieving that diversity. If our Constitution "prefer[s] 'the power of reason as applied through public discussion'," *id.* (citation omitted), "[r]egardless of how beneficent-sounding the purposes of controlling the press might be", *id.*, even though "occasionally debate on vital matters will not be comprehensive and . . . all viewpoints may not be expressed", *id.* at 260, a medium that does capture comprehensive debate and does allow for the expression of all viewpoints should receive at least the same protection from intrusion.

Id. at 881.

Judge Dalzell's finding that the Internet is "a far more speech-enhancing medium than print," *id.* at 882, raises the question whether a higher degree of First Amendment protection should be applied to the Internet than has historically been granted to print media. Alternatively, by arguing that the Internet is more democratic and diverse than print, he asserts that the Internet should receive at *least* the same degree of protection available to print media.

The district court's Findings of Fact also support the argument that the Internet should be considered, for First Amendment purposes, at least equivalent to print publishing:

> Web standards . . . have grown to meet the publishing needs of many large corporations, banks, brokerage houses, newspapers and magazines which now publish "online" editions of their material, as well as government agencies, and even courts, which use the Web to disseminate information to the public. At the same time,

> Web publishing is simple enough that thousands of individual users and small community organizations are using the Web to publish their own personal "home pages," the equivalent of individualized newsletters . . . .

Id. at 837. *See e.g.*, *The Ethical Spectacle*, a web-based magazine available at: http://www.spectacle.org (published by Jonathan Wallace d.b.a. The Ethical Spectacle, a plaintiff in this action).

Accordingly, only by treating the Internet as analogous to print media will this Court ensure the full applicability of the First Amendment in the 21st Century. It is an imaginable, even a likely outcome, that someday text printed on paper will constitute merely a small percentage of all the available text, with the rest stored in electronic format on the Internet and other networks. Only by extending to the Internet the full protections of the First Amendment established for print will this Court ensure that the same text, whether in electronic or paper form, will receive consistent treatment.

Congressional supporters of the CDA have made it absolutely clear that they intended this law to apply to literary text when published on the Internet. Congressman Goodlatte of Virginia, addressing the House of Representatives, said, "if someone transmits the entire novel '*Catcher in the Rye*' they would not be violating an indecency standard, but if they transmit only certain passages out of context they might." 142 Cong. Rec. H1145-06 (daily ed. Feb. 2, 1996) (statement of Rep. Goodlatte). The proposition that excerpts from *Catcher in the Rye*, quoted in a print essay or anthology would be 'indecent" is inherently discomforting. A failure to regard the Internet as analogous to print will create a double standard for literary works; one that allows broad protection when these works are printed on paper or stored on a shelf of a bookstore, but creates criminal liability for the same literary works and other protected speech in an electronic format.

Other commentators have drawn the analogy between the Internet and print media. For example, a leading text has described the Net as a "constellation of printing presses and bookstores":

> Every computer connected to the Net is a printing press, which its owner can use to write the next *Common Sense*, the next *Walden* or *Aeropagitica*, and send it off to the world. But every computer connected to the Net is equally a bookstore, which can store all these works and make them available to anyone who wants to download them.

Jonathan Wallace & Mark Mangan, *Sex, Laws and Cyberspace* 228 (1996).

A recent Cato Institute report recommends "a view [of] the significance of computer networks in the marketplace of ideas . . . through the lens of analogy. One could say that computer networks have the power to transform the ordinary person into a publisher, a broadcaster, [or] a newspaper editor." Solveig Bernstein, *Beyond the Communications Decency Act: Constitutional Lessons of the Internet*, 6 Cato Institute Policy Analysis No. 262 (November 4, 1996).

A leading work on the law of online services and the Internet also endorses the print analogy:

> In attempting to describe the place of online services as part of today's computer network revolution, it is natural to reach to the book metaphor as symbol and vehicle of the last glorious advance in distributing information on a previously unimagined scale. There is some validity to the model. Much of the file traffic on online systems consists of text files, which can be considered the electronic analogue to printed books. While most of the texts are still plain, more book like presentations are being introduced all the time. Sorting through text files can be much like skimming the spines in a row of books. Downloading a text file for later reading can be like taking a book home from the store, especially if the electronic service charges for the download in some form. Some providers take the book metaphor very literally. There are a growing number of actual books online in electronic text form, and a growing number of

> online services referring to themselves as electronic bookstores.

Lance Rose, *Netlaw* 18 (1995). Professor Tribe asserts that "computer gateways and bulletin boards are really the 'bookstores' of cyberspace; most of them organize and present information in a computer format, rather than generating more information content of their own." Tribe, *The Constitution in Cyberspace*, *supra*.

While broadcast media are often regarded as the death of print literacy, cyberspace has been heralded as a welcome restoration of print to primacy. Richard Lanham, a professor of English and author of a widely used text on rhetoric, has written extensively about the effects of online hypertext on literacy:

> We may expect a [good] deal of commentary greeting the electronic modification of print literacy as the death of the Western self. Surely the opposite is taking place. The characteristically unstable Western self, by turns central and social, sincere and hypocritical, philosophical and rhetorical, is just what electronic literacy has been busy revitalizing . . . .
>
> The basic implications of electronic technology may be inevitable but what we make of them certainly is not. We are free to think about, and plan for, literary creation and literary study in ways more agile, capacious, and hopeful than any generation has possessed since literature began to figure in human life.

Richard Lanham, *The Electronic Word: Democracy, Technology and the Arts* 25 (1993).

A significant pair of libel cases also treat online services, the predecessors to the Internet, as bookstores under the rule of *Smith v. California*, 361 U.S. 147 (1959) or as publishers, in accordance with *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

In *Cubby, Inc. v. Compuserve, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991), the court considered whether to hold the Compuserve Information Service liable for an allegedly defamatory statement made online by a user of the service. The court held:

> Compuserve's CIS product is in essence an electronic, for-profit library that carries a vast number of publications and collects usage and membership fees from its subscribers in return for access to the publications. . . . While Compuserve may decline to carry a given publication altogether, in reality, once it does decide to carry that publication, it will have little or no editorial control over that publication's contents.

Id. at 140. The court concluded that "Compuserve has no more editorial control over such a publication than does a public library, bookstore, or newsstand, and it would be no more feasible for Compuserve to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so." *Id. See also Stern v. Delphi Internet Services Corp.*, 165 Misc. 2d 21, 626 N.Y.S.2d 694, (Sup. Ct., N.Y. Co. 1995) (Online service is analogous to a news vendor or bookstore, or a letters-to-the-editor column of a newspaper).

However, in *Stratton Oakmont v. Prodigy*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), when Prodigy relied upon *Cubby* in an effort to avoid defamation liability, the court rejected the defense ostensibly because Prodigy was more like a publisher that makes editorial decisions than a bookstore or library that merely distributes publications. This was due to Prodigy "[holding] itself out to the public and its members as controlling the content of its computer bulletin boards." *Id.* at 2. Significantly, both *Cubby* and *Stratton Oakmont* sought the correct analogy for online services in print media. *See also It's In The Cards, Inc., v. Fuschetto*, 193 Wis. 2d 429, 535 N.W.2d 11 (App. 1995) (Posting a message to an on-line bulletin board is a "random communication of computerized messages analogous to posting a written notice on a public bulletin board").

There is a growing tendency, endorsed by Justice Thomas and joined by the Chief Justice and Justice Scalia in the *Denver* case, to regard even cable television as analogous to print:

> In *Turner [Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. ___, 114 S. Ct. 2445 (1994)], by adopting much of the print paradigm, and by rejecting *Red Lion*, we adopted with it a considerable body of precedent that

> governs the respective First Amendment rights of competing speakers. . . . Drawing an analogy to the print media, for example, the author of a book is protected in writing the book, but has no right to have the book sold in a particular bookstore without the store owner's consent. Nor can government force the editor of a collection of essays to print other essays on the same subject.

116 S. Ct. at 2421 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., concurring in the judgment in part and dissenting in part).

If print is the analogy selected for cable, print must of necessity be the right analogy for cyberspace. Indeed, it would be illogical to assimilate the Internet to a broadcast model if such a model was not used for cable, which is far more similar to broadcast television than the Internet. "The weight of opinion at the moment seems to have shifted toward adopting a unitary print media model for the entire mass media. . . ." Lee C. Bollinger, *Images of a Free Press* 86 (1991) (discussing *Columbia Broadcasting Sys. v. F.C.C.*, 453 U.S. 367 [1981] [Fairness Doctrine case analogizing broadcasters to print journalists]).

As Justice Thomas noted in *Denver*, 116 S. Ct. at 2421, this Court appeared to endorse that view in *Turner*, when it wrote:

> The broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitation that characterizes the broadcast medium. . . . At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas or beliefs deserving of expression, consideration and adherence. Our political system and cultural life rest upon this ideal.

114 S. Ct. at 2457.

A major advantage of the analogy to print is that it forces legislators and judges to focus on the First Amendment's protective goals, rather than losing sight of them in a fruitless analysis of technological distinctions without a difference. As Professor Tribe concluded: "[T]he Constitution's norms, at their deepest

level, must be invariant under merely technological transformations." Tribe, *The Constitution in Cyberspace*, *supra*. Adoption of a print analogy will avoid the differential treatment of the same text in print and electronic versions.

CONCLUSION

In conclusion, this case provides an opportunity for this Court to create uniformity from inconsistency and order from confusion. We respectfully urge this Court to accomplish this task by finding that print is the proper analogy for the Internet.

Dated: February 19, 1997

Respectfully Submitted,

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(18)

Supreme Court, U.S.
FILED
FEB 20 1997
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No. 96-511

In The

Supreme Court of the United States

October Term 1996

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Appellants,

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Pennsylvania

BRIEF OF APOLLOMEDIA CORPORATION AND BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM, AS AMICI CURIAE, IN SUPPORT OF AFFIRMANCE

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INTEREST OF THE AMICI

Amicus ApolloMedia Corporation is a multimedia technology company located in San Francisco, California. Its business is entirely devoted to computer-mediated communications. It designs and constructs sites on the World Wide Web, and it implements Internet systems for the delivery and management of information. Amicus uses computers, modems and telephone lines to communicate its own "content" as well as the content published by its clients and by visitors to its web sites.

ApolloMedia's web sites and some of its clients' web sites often communicate strong positions using expression that may be considered "indecent" by some people in some communities. Its "annoy.com" web site (http://www.annoy.com) enables visitors to construct and send provocative email messages to various public officials and public figures, transmitting views on controversial issues such as single sex marriage, censorship, health care and gays in the military. Amicus' online databases contain material of social or political value, some of which is sexually explicit or uses vulgar language. Among ApolloMedia's clients are the Service Members Legal Defense Network (assisting military service members who are investigated concerning alleged homosexuality or who oppose sexual harassment), and the Hawaii Equal Rights Marriage Project (attempting to secure the right to marriage for gay and lesbian couples).

ApolloMedia has filed an action in the Northern District of California (*ApolloMedia Corporation v. Reno*, No. C-97-0346 MMC), challenging the constitutionality of the provision of the Communications Decency Act ("CDA"), 47 U.S.C. § 223(a)(1)(A)(ii), that makes criminal any "indecent" computer communication "with intent to annoy." The Court's resolution of "indecent" speech issues in the instant case, under different CDA provisions (§§ 223(a)(1)(B)(ii) and (d)(1)(B)), may affect certain issues in ApolloMedia's action.

Amicus Bay Area Lawyers for Individual Freedom (BALIF) is a minority bar association comprised of over 500 lesbian, gay and bisexual members of the Bay Area legal community. Founded in 1980, BALIF promotes the professional interests of its members and the legal interests of the gay, lesbian and bisexual community at large.

BALIF frequently appears as amicus curiae in cases in which it can provide perspective that will inform a court's decision on a matter of broad public importance. BALIF believes this to be such a case. The speech of BALIF's members, their clients and lesbian, gay and bisexual Californians in general is restricted by the CDA. They routinely use computer-mediated forms of communication. BALIF itself maintains a web site (http://www.balif.org), with links to a variety of other sites and organizations of interest to BALIF members, including Gay.Net. Because the CDA targets sexual speech, and because BALIF is identified in part by its members' sexual orientation, the CDA's attempt to outlaw "indecent" speech threatens the full and frank discussion of matters of great concern to BALIF. Indeed, BALIF is aware that the very concept of homosexuality is considered "indecent" to some people in some communities, and the CDA therefore poses a particular threat to the speech of BALIF and the gay, lesbian and bisexual community it represents.

The parties have consented to the filing of this brief, and amici have lodged letters of consent with the Clerk.

SUMMARY OF ARGUMENT

1. The federal government's power to regulate interstate commerce does not confer on it a "compelling interest" in restricting the speech of ordinary citizens using computers. Any federal interest in policing sexual morality is attenuated. It is further attenuated, compared to its power over goverment licensed broadcasters, by the nature of the Internet medium, the most democratic ever

invented. The CDA supplants the authority of parents and the states by banning speech that some parents affirmatively wish their children to have access to (e.g., information about avoiding sexually transmitted diseases) or are willing to trust their children with. Speech is made criminal and banned for everyone if it is deemed "patently offensive" for five-year olds. The government's alternative argument, that it has a compelling interest in making sure that people are not deterred from using the Internet fails in light of the reality that the Internet is flourishing and Americans are flocking to it, and there is simply no need for coercive federal criminal intervention.

2. The CDA exempts intrastate communications. It is practically unenforceable against communications originating abroad, which are a substantial portion of sexually explicit communications. The CDA's formal and practical underinclusiveness means that it does not effectively prohibit many if not most "indecent" communications. Because the CDA's speech restrictions do not effectively serve the government's asserted purpose in shielding children from such communications, they violate the First Amendment.

3. Section 223(a)(1)(B)(ii) criminalizes "indecent" speech but does not define it. "Indecency" has no meaning sufficiently intelligible to make its prohibition criminally enforceable. The government's attempt to rescue the statute by relying on a committee report to supply the missing definition violates settled canons of statutory interpretation and due process requirements of fair notice. The prohibition is impermissibly vague for a criminal statute.

4. As construed by the government, the CDA uses only one part of the three-part test of *Miller v. California*, 413 U.S. 15, 24 (1973), to make criminal speech that is not legally obscene. This violates the First Amendment because it punishes speech with societal value and because, when the "patently offensive" prohibition is uncoupled from the prurient-appeal and no-societal value

rules for obscene speech, the law is impermissibly vague. The wholly uncertain applicability of the CDA defenses actually compounds the vagueness of the statute. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048-49 (1991). In addition, using "community standards" to judge a non-geographic medium like the Internet means that speech offensive to the least tolerant community in the nation is banned from all communities. The subjective "patently offensive" standard, standing alone, invites both discriminatory enforcement and unseemly government surveillance of the online communications of ordinary innocent citizens.

ARGUMENT

The Court has never upheld a *criminal* statute outlawing either "indecent" or "patently offensive" speech that is not legally "obscene."[1] The provisions of the CDA at issue in this case punish pure speech as a felony.

[1] In *Denver Area Educ. Telecommunications Consortium v. FCC*, 116 S. Ct. 2374 (1996), the Court considered a non-criminal provision of the 1992 cable television act that was entirely permissive, authorizing, but not requiring, cable operators to refuse to carry "patently offensive" sexual material. 116 S. Ct. at 2387. A plurality of the Court found that the provision was not vague. *Id.* at 2390. Not only did *Denver* involve a non-criminal statute, but the Court emphasized the special characteristics of the medium, noting that cable television is essentially the same as broadcast in being a "pervasive" presence, "uniquely accessible to children" and capable of confronting them "with little or no warning." Computer-mediated communication, for the many reasons set forth in the findings of fact below, *ACLU v. Reno*, 929 F. Supp. 824, 830-49 (E.D. Pa. 1996), is very different from broadcast. One of those reasons – the ability of consumers to block communications that they do not want their children to see – was emphasized by the Court in *Denver* in striking down the provision of the 1992 cable act requiring *operators* to "scramble and block" sexual material. 116 S. Ct. at 2392-93. The provision invalidated by the Court is more closely analogous to the CDA provisions at issue in this case than the permissive provision upheld by the Court.

The CDA is not a "sensitive tool" for regulating unprotected speech. *See Speiser v. Randall*, 357 U.S. 513, 525 (1958). Instead, it is a clumsy and defective piece of legislation that builds a censorship edifice on the flimsiest of foundations: it prohibits unknowable kinds and quantities of speech ("indecent") not defined by the statute; the government's proposed definition of the forbidden speech, borrowed from a committee report, was in turn borrowed from the FCC's definition used to regulate government licensees in a very different medium (broadcast); and the FCC's definition in turn borrowed one part of the three-part test for "obscene" matter established by *Miller v. California*, 413 U.S. 15 (1973). At each step in the construction of this censorship structure, the CDA's unconstitutionality has been compounded.

I. THE FEDERAL GOVERNMENT'S POWER TO REGULATE INTERSTATE COMMERCE DOES NOT CONFER ON IT A "COMPELLING" INTEREST IN REGULATING "INDECENT" SPEECH BY ORDINARY CITIZENS USING COMPUTERS

The primary battleground on which this case has been fought is whether the CDA is "narrowly tailored." But the CDA's attempt at regulation of the speech of ordinary citizens requires a determination, first, whether the *federal* government has both the constitutional power and a compelling interest in regulating citizen speech (not the speech of federally-licensed broadcasters) using computers. The requisite power and interest cannot simply be assumed. *E.g., First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1988) (burden on government); *id.* at 788-89 (asserted interests not "supported by record

or legislative findings"). Only if, after consideration of all the relevant facts, the Court finds the federal interest to be "compelling" need it decide whether the CDA is "narrowly tailored" to serve the interest.

Congress has only the legislative powers enumerated in the Constitution. All other powers are reserved, under the Tenth Amendment, to the states and the people. The federal government needs to be reminded on occasion that it, unlike the states, has no general police power. In particular, "the domain of sexual morality is pre-eminently a matter of state concern." *Roth v. United States*, 354 U.S. 476, 502 (1957) (Harlan, J., dissenting in part). Interests protected by statutes on sexual morality are "primarily entrusted to the care, not of the federal government, but of the states. Congress has no substantive power over sexual morality." *Id.* at 504.

As the Court held in *Roth*, Congressional power to regulate obscene matter in the mails is based on its express power over the postal system under Article I, section 8, clause 7 of the Constitution. 354 U.S. at 492-93. Even this plenary power over the postal system does not justify Congressional attempts to restrict unpopular speech transmitted by mail. *E.g., Bolger v. Young's Drug Products Corp.*, 463 U.S. 60 (1983) (invalidating federal statute that prohibited unsolicited mail advertising of contraceptives); *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (invalidating requirement that persons receiving "Communist propaganda" had to request delivery of such mail). Congress has no express power over other forms of communication, including the Internet, and therefore any regulatory power must be implied from its power over interstate commerce. *See National Broadcasting*

Co. v. United States, 319 U.S. 190, 227 (1943) (Communications Act of 1934 provision a proper exercise of Congressional power over interstate commerce).[2]

The federal commerce power, however, is not unlimited. *United States v. Lopez*, 115 S. Ct. 1624 (1995). If under *Lopez* Congress lacks power under the Commerce Clause to protect children from the very serious problem of violence associated with guns in schools, it is hard to see why its interest in shielding them from private online speech should be considered "compelling." As Justice Harlan pointed out, "Not only is the federal interest in protecting the Nation against pornography attenuated, but the dangers of federal censorship in this field are far greater than anything the States may do." *Roth, supra*, 354 U.S. at 505. The "deadening uniformity" of national censorship is one of the dangers. *Id.*

The "attenuated" federal interest in regulating sexual morality is further attenuated by the nature of the online medium. As Justice Frankfurter pointed out in *NBC* with regard to the broadcast medium, "Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to

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[2] The provisions at issue in this case are not limited to commercial speakers. For example, they are far broader than the prohibition of obscenity on the telephone, where the statute, 47 U.S.C. § 223(b)(1), is limited to transmission of obscenity "for commercial purposes." *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989). The Court has upheld non-criminal regulation of federally licensed commercial operators of broadcast and cable television outlets. *E.g., Red Lion v. FCC*, 395 U.S. 367 (1969); *Denver Area Educ. Telecommunications Consortium v. FCC*, 116 S. Ct. 2374 (1996). But the CDA reaches far beyond commercial uses to regulate the speech of ordinary citizens using computers.

use it must be denied." 319 U.S. at 226; *accord, Red Lion*, 395 U.S. at 386-401. But the Internet *can* be used by all. "Unlike other modes of expression," there is no scarcity of frequencies or facilities that could justify government content regulation. Nor is it "intrusive" in the sense that an unwanted communication may enter the home unbidden and "confront" unsuspecting children. *Cf. FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978). Nor is it a medium "uniquely accessible to children." *Id.* at 749. Receiving any computer-mediated communication requires both affirmative effort and significantly more sophistication than turning on a television set or picking up a telephone.

The government asserts that "the indecency problem" on the Internet is "much more pronounced than it is on broadcast stations." U.S. Br. at 29. According to the government, this is because the Internet operates "without the intervention of editors, network censors, or market disincentives." *Id.* In other words, according to the government, because ordinary citizens can communicate with each other directly, not as the passive recipients of programming directed at them by powerful corporations, the government is entitled to step in and make criminal the citizen speech that it disfavors. The perverse result is that the more democratic the medium – in the sense of being free of corporate "censors" and commercial "disincentives" – the greater the government's right to regulate the medium. If the First Amendment means anything, this argument must be rejected out of hand.

Finally, any federal interest is attenuated because the CDA officiously meddles in what is first and foremost the domain of parents, not government. It overrides parents' wishes and criminalizes speech that some parents affirmatively wish their children to have access to, e.g., information about how to avoid sexually transmitted diseases.

It criminalizes speech that some parents are willing to trust their children with. It makes felonies speech that would be perfectly appropriate for 17-year old minors simply because it might be deemed "patently offensive" in some communities for *5-year old* children. (The CDA makes no distinction between older minors and toddlers, banning speech if it is "available" to *any* minor.) Further, the CDA ignores the fact that parents may easily install software on their computers that prevents their children from gaining access to material that the parents do object to. *ACLU v. Reno*, 929 F. Supp. at 838-42. In short, the CDA supplants parental control with governmental control over the information that children have access to, and it supplants state authority with federal authority over sexual morality. It does so without hearings, findings or any evidence of *what* speech might cause *what* harm to *what* minors.

As Judge Dalzell noted, the asserted interest in protecting children "is as dangerous as it is compelling" because it has "no limiting principle." *ACLU v. Reno*, 929 F. Supp. at 882. It would, for example, authorize Congress to enact a "Newspaper Decency Act," *id.*, and, in the name of protecting children, to restrict wide varieties of speech disfavored by paternalistic legislators.

The Court should conclude that Congress does not in fact have a compelling interest in shielding all children, of whatever age and regardless of their parents' wishes, from sexual speech on the Internet. The Court's decision in *Ginsberg v. New York*, 390 U.S. 629 (1968), cannot carry the freight that the government attempts to load on it. The government contends, first, that what it calls the CDA's "specific child" and "transmission" provisions are "essentially no different" from the New York law in *Ginsberg*. U.S. Br. at 24. The Court in *Ginsberg* rejected the argument of a commercial seller of pornography that

minors had the right to see the same materials available for sale to adults. 390 U.S. at 636-37. *Ginsberg* involved a *state* law enacted in the state's police power, not a federal commerce regulation. The Court specifically noted that the validity of the law rested on the state's power "to control the conduct of children" (*id.* at 638-39), a power that the federal government does not have. Justice Stewart, concurring, said that the law was valid on the same basis that the states may deny minors the right to marry or to vote. *Id.* at 649-50.

Furthermore, the state statute in *Ginsberg* embodied a legislative approach that Congress expressly and deliberately *rejected* in the CDA. The New York law precisely defined types of materials that were deemed by the state to be "harmful to minors." 390 U.S. at 645-47. For example, the state statute contained detailed definitions of "nudity, sexual conduct, sexual excitement, or sado-masochistic abuse,"[3] which, when the material met the three-part test of *Miller* as obscene for minors, were deemed to be "harmful to minors." Congress, however, "considered, but rejected the so-called 'harmful to minors' standard. *See Ginsberg v. New York* . . . " Conf. Report at 188, reprinted in 1996 U.S. Code Congressional Adm. News, at 202. Oddly, it is the very approach specifically rejected by Congress that is now relied upon by the government.[4]

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[3] Typical of the detail in the definitions was "nudity": the "showing of the human male or female genitals, pubic area or buttocks with less then a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state." 390 U.S. at 645.

[4] Nor did *Ginsberg* approve the prohibition of "indecent" material. It was an obscenity case, in which satisfying all three parts of the "three-pronged test" (390 U.S. at 635) was required

Finally, now that the case is in this Court, the government asserts – without any supporting evidence or congressional finding – a new "compelling interest in protecting the First Amendment interests of all Americans," not just children, in using the Internet. U.S. Br. At 31. The argument is that the Internet's potential "will be lost" if people are "unwilling to avail themselves of its benefits because they do not want their children exposed to patently offensive material." *Id.* at 30. There is, however, no evidence to support the suggestion that substantial numbers of people are foregoing the communicative benefits of the Internet for fear of exposing their children to "indecent" material. In fact, all the evidence shows that the Internet is flourishing and American participation in it is growing by leaps and bounds. Households, schools and businesses are flocking to it in ever increasing numbers. It "ain't broke" and does not need government "fixin'" to make it work for the people.[5] *If* any parents are sufficiently concerned that they might be "deterred" from using the Internet, they have it within their power – with no need for coercive government criminal intervention –

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by the statute. The Court approved the statute's "variable obscenity" approach, so that the material could be deemed obscene if it had prurient appeal for persons under 17, if it was patently offensive with respect to what was suitable for minors and if it was "utterly" without redeeming social importance for minors. *Id.* at 632. In sharp contrast, the CDA makes speech criminal if it meets only *one* part of the three-part test for obscenity. *See* point IV, *infra*.

[5] At a minimum, the government has not carried its burden of proof that substantial numbers of people in fact are afraid to use the Internet because they do not wish their children to see "indecent" material. *See Turner Broadcasting Sys. v. FCC*, 114 S. Ct. 2445, 2470 (1994) (government failed to prove that statute met actual need to preserve free broadcast).

to monitor their children's use and to install the readily available software that screens out undesired material.

Furthermore, recognizing a "compelling government interest" in making sure that a communications medium is "family friendly" (U.S. Br. at 7) has disturbing implications. Such an interest could as easily be asserted with regard to "indecent" speech in public parks or leaflets passed out on street corners. If the federal government were given free rein to ensure "family friendly" communications media, it could regulate depictions of violence, use of profanity and almost any other content disfavored by legislators. The simple truth is that criminalizing the speech of ordinary citizens in the name of making sure that all speech on a medium is acceptable to the majority – who may otherwise desert the medium – is inconsistent with the very purpose of the First Amendment.

II. BECAUSE THE CDA EXEMPTS INTRASTATE COMMUNICATIONS AND IS NOT PRACTICALLY ENFORCEABLE AGAINST COMMUNICATIONS ORIGINATING ABROAD, THE GOVERNMENT'S ASSERTED INTEREST IS NOT IN FACT SERVED BY ITS SPEECH RESTRICTIONS

Sections 223(a)(1) and (d)(1) of the CDA apply only to "interstate and foreign communications." These are defined terms in the Communications Act. 47 U.S.C. § 153 (e) and (f). The definition of "interstate communication" is a common sense one, meaning a communication or transmission "from any State . . . to any other State." *See Sprint Corp. v. Evans*, 846 F. Supp. 1497, 1500-01 (M.D. Ala. 1994).

Because Congress elected in the CDA not to make criminal *intra*state computer communications, the Act exempts innumerable communications that may well

include "indecent" or "patently offensive" material. For example, a "chat room" or email sexual proposition from a pedophile to a child in the same town is not covered by the Act. Nor are cross-town facsimile transmissions. Similarly, intrastate email among employees in a business, or students at a university, is not covered. Many other online communications of all kinds, so long as they do not cross state lines, are simply not covered.

In *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), the Court invalidated a Florida law prohibiting disclosure of rape victims' names in "any instrument of mass communication." The Court held that the law's "facial underinclusiveness" undermined the state's claim that it was in fact accomplishing its asserted purpose of protecting the victims' privacy. The law did not "prohibit the spread by other means of the identities of victims of sexual offenses," and did not cover communications by individuals (like the "backyard gossip") at all. 491 U.S. at 540. The Court held that "without more careful and inclusive precautions against alternative forms of dissemination, we cannot conclude that Florida's selective ban on publication by the mass media satisfactorily accomplishes its stated purpose." Justice Scalia stated the defect in the law concisely in his concurring opinion, in terms directly applicable here: the speech restriction is invalid "when it leaves appreciable damage to that supposedly vital interest unprohibited." 491 U.S. at 542.

Similarly, in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), the Court invalidated a law that made it a crime for a newspaper (but not electronic media) to publish the names of juvenile offenders. The Court held that the law failed to "accomplish its stated purpose." 443 U.S. at 105. As now Chief Justice Rehnquist remarked, it is "difficult to take very seriously [the government's] asserted need to preserve the anonymity of its youthful

offenders when it permits other, equally, if not more, effective means of mass communication to distribute this information without fear of punishment." *Id.* at 104-05 (Rehnquist, J., concurring); *accord, First National Bank of Boston v. Bellotti, supra,* 435 U.S. at 792-93 (statute invalid because "both underinclusive and overinclusive" in dealing with asserted interests).

In addition to exempting intrastate communications, the CDA is prevented from effectively serving the interest in protecting children by the fact that a "large percentage, perhaps 40% or more, of content on the Internet originates outside the United States." *ACLU v. Reno,* 929 F. Supp. at 848; *see Shea v. Reno,* 930 F. Supp. 916, 931 (S.D.N.Y. 1996). Perhaps "thirty percent of the sexually explicit material currently available on the Internet originates in foreign countries." *Shea,* 930 F. Supp. at 931. "Pornography from, say, Amsterdam will be no less appealing to a child on the Internet than pornography from New York City, and residents of Amsterdam have little incentive to comply with the CDA." *ACLU,* 929 F. Supp. at 882-83. Thus, for this reason alone, "the CDA will almost certainly fail to accomplish the Government's interest in shielding children from pornography on the Internet." *Id.* at 882. The CDA "will not reach a significant percentage of the sexually explicit material currently available." *Shea,* 930 F. Supp. at 941.

(The extent to which the quixotic CDA is ineffective is emphasized by the twin realities that minors are in fact exposed to "indecent" speech in many more direct and pervasive ways than through computers, and shutting down even some of those ways through measures like a Newspaper Decency Act, a Novel Decency Act, a Village Green (or "Schoolyard," or "Lockerroom") Decency Act or a Postal Decency Act would be palpably unconstitutional. *See ACLU,* 929 F. Supp. at 882.)

The Court frequently has invoked the principle that a speech restriction must be demonstrably *effective. E.g., 44 Liquormart, Inc. v. Rhode Island,* 116 S. Ct. 1495, 1509 (1996) (state failed to demonstrate that ban on liquor advertising actually reduced alcohol consumption); *Turner Broadcasting Sys. v. FCC,* 114 S. Ct. 2445, 2470 (1994) (government must meet burden of establishing that speech regulation "will in fact alleviate these harms in a direct and material way"); *Edenfield v. Fane,* 113 S. Ct. 1792, 1800 (1993) (even restriction on commercial speech requires such justification).

Because the CDA is facially underinclusive in that it does not reach intrastate communications, and because it cannot practically prevent foreign materials from reaching minors in this country, it does not effectively accomplish the government's asserted goal of shielding minors from "indecent" and "patently offensive" speech. Therefore, it is not effective in serving a compelling government interest, and for this reason violates the First Amendment.

III. SECTION 223(a)(1)(B)(ii)'s FAILURE TO DEFINE THE "INDECENT" SPEECH THAT IT MAKES CRIMINAL RENDERS IT UNCONSTITUTIONALLY VAGUE

Section 223(a)(1)(B)(ii) prohibits communicating any "indecent" speech (including mere words) to anyone under age 18. Here, the CDA overinclusively bans "indecent" speech by telephone, fax machine or email, to a 17-year-old if it would be "indecent" for a toddler, even outlawing communications that the parents of the minor recipient know of and permit (or, indeed, send).

The provision does not define "indecent." "Indecent" can mean many things to different people. For example, it

might include depictions or descriptions of violence, profanity or blasphemy, all of which are considered "indecent" by some people. The word is defined in the dictionary as "1. offensive to good taste; unseemly. 2. offensive to public morals; immodest; indecent exposure – See Synonyms at improper." *American Heritage Dictionary of the English Language*, 668 (1st ed. 1969). The synonyms are "improper, unbecoming, unseemly, indelicate, indecent, indecorous." *Id.* at 662.

Amici have found only one legislative definition of "indecent" in the federal Codes. 18 U.S.C. § 1461, dealing with obscene materials in the mails, provides that: "The term indecent as used in this section includes matter of a character tending to incite arson, murder, or assassination." In *United States v. Smith*, 11 Fed. 663 (C.C.Ky. 1882), in quashing an information under this statute, the court ruled that "indecent" means "immodest, impure," not "coarse, or unbecoming, or even profane."

Given these diverse definitions, "indecent" has no meaning sufficiently intelligible or coherent to make its prohibition criminally enforceable. The government, however, relying not on anything in the statute itself but on a conference report, says that "indecent" in subsection (a)(1)(B)(ii) (speech communicated to a minor via "telecommunications device") *means* "patently offensive" sexual speech as referred to in subsection (d)(1)(B) (speech "available" to a minor via an "interactive computer service"). The conference report states that "The conferees intend that the term indecency (and the rendition of the definition of that term in new section 502) has the same meaning as established in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), and *Sable Communications of California v. FCC*, 492 U.S. 115 (1989). . . . " Conf. Report at 188, reprinted in 1996 U.S. Code Congressional & Administrative News, at 201.

Even if the intent of the few "conferees" were relevant for the purpose of supplying a missing definition in a criminal statute, the report is inaccurate in stating that "indecency" is defined in section 502; it is not. In fact, the CDA does not even use the noun "indecency." Further, contrary to the conference report, "indecency" under the CDA cannot have the "same meaning" as in *Pacifica*; the FCC's definition that the Court upheld for administrative (not criminal) purposes referred to patently offensive language "as measured by contemporary community standards *for the broadcast medium . . . at times of the day* when there is a reasonable risk that children may be in the audience." 438 U.S. at 732 (emphasis added). This cannot be applied to online communication, which is asynchronous.

The government's attempt to salvage subsection (a)'s criminalization of undefined "indecent" communications by reference to a different term in a different provision of the statute must be rejected. If Congress uses language in one section of a statute but omits it in another, it is presumed that Congress acted intentionally and intended different meanings. *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991); *Russello v. United States*, 464 U.S. 16, 23 (1983). Further, to read "indecent" as redundant of "patently offensive" is to rob it of independent meaning in violation of the rule that a "statute must, if possible, be construed in such fashion that *every word* has some operative effect." *United States v. Nordic Village*, 503 U.S. 30, 36 (1992) (emphasis added); *Bowsher v. Merck & Co.*, 460 U.S. 824, 833 (1983).

More fundamentally, it is entirely inappropriate for the government to attempt to validate a criminal statute, which requires fair notice of precisely what is proscribed, by relying on a conference report. "Congress is elected to enact statutes rather than point to cases," and

"unrestrained use of legislative history" by reference to committee reports is no substitute for valid legislation. *Blanchard v. Bergeron*, 489 U.S. 87, 89 (1989) (Scalia, J., concurring); *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 616, 619-22 (1991) (Scalia, J., concurring); *see generally*, Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 Harv. L. Rev. 1005 (1992). Reliance on a committee report citing a case to supply a statutory term crucial to its validity is particularly inappropriate. "As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist . . . " *Blanchard v. Bergeron, supra*, 489 U.S. at 98 (Scalia, J., concurring).

Amici recognize that one judge in *ACLU v. Reno* and the court in *Shea v. Reno* accepted the government's argument that the conference report supplied the missing definition of "indecent," and that "indecent" means "patently offensive. . . . " But neither gave any consideration to the rules of statutory construction cited above. More importantly, the authorities on which they relied involved only civil administrative uses of "indecent" as equivalent to "patently offensive" – FCC regulations and decisions, *Pacifica* and the television cases following *Pacifica*. Since *none* of those authorities involved *criminal* statutes, the Court should not sanction their incorporation to salvage a defective criminal law. *See generally Pope v. Illinois*, 481 U.S. 497, 507-19 (1987) (Stevens, J., dissenting).[6] The requisites for valid criminal statutes –

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[6] Justice Stevens was the author of *Pacifica*. His opinion in *Pope* explains at length why *Pacifica*-type administrative or civil speech regulation is entirely inappropriate for *criminal* prohibitions.

adequate notice and precision to discourage arbitrary enforcement – rule out such legislation by indirection.

Because § 223(a)(1)(B)(ii) makes criminal a broad range of "indecent" speech, without defining the term, this provision of the CDA is void for vagueness. *See, e.g., Kolender v. Lawson*, 461 U.S. 352, 357, 359, n.8 (1983); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Winters v. New York*, 333 U.S. 507, 515 (1948).

IV. THE COURT SHOULD REJECT ANY ATTEMPT TO BORROW ONE-THIRD OF THE *MILLER V. CALIFORNIA* TEST FOR THE PURPOSE OF CRIMINALIZING NON-OBSCENE SPEECH

Even if, contrary to amici's contention in point III, § 223(a)'s prohibition of "indecent" speech is read to mean "patently offensive" sexual speech as prohibited by § 223(d)(1)(B), the patently offensive proscription is itself unconstitutional. It bears emphasis again that the Court has never upheld a *criminal* statute outlawing "patently offensive" speech that is not legally "obscene" under the test of *Miller v. California*, 413 U.S. 15, 24 (1973).

The Court struggled in the 1950's and 1960's with whether "obscene" speech could be either meaningfully defined or punished criminally. *E.g., Roth v. United States*, 354 U.S. 476 (1957); *Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964); *id.* at 197 (Stewart, J.: "I know it when I see it"). In *Miller* the Court attempted to resolve those questions by establishing a three-part test for obscenity regulation: (1) the "work" must appeal to the "prurient" interest; (2) its depictions of sexual acts must be "patently offensive" as judged by community standards; and (3) the work must lack "serious literary, artistic, political or scientific value." 413 U.S. at 24.

Several members of the Court have expressed their dissatisfaction with the *Miller* test even as to obscenity.

See, e.g., Pope v. Illinois, 481 U.S. 497, 505-06 (1987) (Scalia, J.) (need for "reexamination" of *Miller*, since whether material has literary or artistic value is matter of taste and "*De gustibus non est disputandum*"); *id.* at 516 & n.11 (Stevens, J.) (criminal prosecution for obscenity involving consenting adults should not be permitted); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 84 (1973) (Brennan, J., dissenting); *cf. Alexander v. United States*, 509 U.S. 544, 573 (1993) (Kennedy, J., dissenting, with Blackmun, Stevens and Souter, JJ.) (obscenity "separated from protected expression only by a 'dim and uncertain line' ").[7]

Each of the three parts of the *Miller* test must be met to criminalize even obscene speech. *Cf. Pope v. Illinois*, 481 U.S 497 (1987) (societal value part not to be judged by community standards, which govern offensiveness and prurient parts); *id.* at 507-08 (Stevens, J., dissenting: "prosecutor must prove each of these three elements beyond a reasonable doubt"). If the CDA borrows only one-third of the *Miller* guidelines to outlaw "patently offensive" speech on the Internet, it violates the First Amendment because it criminally punishes valuable speech and because, when it is uncoupled from the prurient-appeal and no-societal-value rules for obscene speech, the subjective patently offensive "test" becomes impermissibly vague for use in a criminal statute. In addition, judging offensiveness by geographic "community standards" means that Internet speech is barred

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[7] *See also Smith v. United States*, 431 U.S. 291, 316 (1977) (Stevens, J., dissenting) ("line between communications which 'offend' and those which do not is too blurred to identify criminal conduct"); *accord, Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569, 756 (1987) (O'Connor, J.: line too "murky"); *Alexander, supra* (line too uncertain for criminal forfeiture purposes); *Kolender v. Lawson*, 461 U.S. 352, 359, n.8 (1983).

everywhere if it is "offensive" in the least tolerant community in the nation, thus denying the speech to the vast majority of Americans to whom it is not offensive.

A. Uncoupling "patently offensive" from the *Miller* obscenity test makes the law impermissibly overbroad, subjective and vague for criminal purposes

As construed by the government, the CDA borrows only the "patently offensive" part of the *Miller* test. It completely omits the other two parts: that the material's appeal be to the "prurient" interest and that the material not have "serious literary, artistic, political or scientific value." Accordingly, the CDA prohibits speech that, by definition, does *not* appeal to the prurient interest and that *does* have serious literary, artistic, political or scientific value. In other words, not only does the CDA criminalize a vast range of speech, but it forbids speech that may have important societal value. It is a "statute of unprecedented sweep," *Shea*, 930 F. Supp. at 922, the most sweeping restriction on the speech of ordinary citizens that Congress has ever attempted.

Examples of patently offensive sexual speech that are protected by the First Amendment can be found in the decisions of this Court. *See, e.g., Cohen v. California*, 403 U.S. 15 (1971), and *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). Cohen's "Fuck the Draft" jacket, worn to court in full view of all spectators, including children, was held to be protected even though highly "offensive" to most citizens. Hustler Magazine's mean-spirited accusation that Rev. Falwell had sex with his mother in an outhouse was deemed "patently offensive" by this Court. 485 U.S. at 50. Even though the parody was "gross and repugnant in the eyes of most" (*id.*), and found by a jury to be an "outrageous" and intentional infliction of emotional harm, it

was held protected. Both examples obviously would be deemed "patently offensive" in some communities and, if the communications had been done by computer rather than in public or print, would be felonies under the CDA.

Bolger v. Young's Drug Products Corp., 463 U.S. 60 (1983), is another example of speech held protected by this Court but subject to criminal punishment under the CDA. *Bolger* invalidated a statute prohibiting unsolicited mail advertising of contraceptives. The advertising – "Plain Talk About Venereal Disease" and "Condoms and Human Sexuality" (463 U.S. at 62, n.4) – might well have been considered "patently offensive" by some recipients, especially those with religious scruples about contraceptives. The Court rejected the government's argument that the statute was needed to keep unsolicited sexual material out of the hands of children. *Id.* at 73-74. But such material, if communicated via the Internet, likely would be a felony in some communities.[8]

Moreover, "patently offensive" is an inherently subjective standard. The speech must be offensive *to* someone. This loose and variable "standard" is wholly inappropriate for a criminal statute of general application enforceable throughout the nation. As Chief Justice Rehnquist wrote for the Court in *Hustler Magazine, supra*, " 'Outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." 485 U.S. at 55.

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[8] In another context, Senator Helms declared that written "safe sex" educational materials were "obscene." 133 Cong. Rec. S14203 (daily ed. Oct. 14, 1987). If a prominent legislator believes that *Bolger*-type materials are "obscene," it is not farfetched to suggest that some prosecutors and juries will find them "patently offensive."

Nor is the CDA's inherent subjectivity cured by the supposed statutory "defenses" set forth in 47 U.S.C. § 223(e)(5). The defenses are not in fact available to most speakers. *Shea*, 930 F. Supp. at 942-48; *ACLU*, 929 F. Supp. at 846, 849, 856, 859. Moreover, their wholly indeterminable applicability to a few speakers (who could theoretically – but not practicably – take some "good faith" step to screen the age of recipients) actually compounds the vagueness of the statute. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048-49 (1991) ("safe harbor" provision of disciplinary rule misled attorney into believing he had defense to vague rule).

The government's reliance on *Pacifica* is completely misplaced. The court below properly rejected the notion that *Pacifica* – involving administrative regulation of a government-licensed broadcaster in a medium that is "uniquely accessible" to children and can "confront" listeners without warning (438 U.S. at 748) – validates a *criminal* statute governing a completely different medium. *Pacifica* involved only a mild declaratory order (not even a reprimand). 438 U.S. at 730. Moreover, in sharp contrast to the initiation of criminal proceedings under the CDA by any of hundreds of federal prosecutors who wish to do so, the FCC stated in *Pacifica* that it would not impose even an administrative sanction "without warning." *Id.* at 743.[9]

The Court's discussion of "borderline" examples of cable television broadcasts in *Denver Area Educ. Telecommunications Consortium v. FCC*, 116 S. Ct. 2374, 2396-97

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[9] *See also, Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 55 (1973) (civil procedure for determining obscenity provides seller with "the best possible notice, prior to any criminal indictments").

(1996), is instructive here. The Court invalidated a provision of the 1992 cable television act that merely *permitted* cable operators to refuse to carry "patently offensive" programming on public access channels. In doing so, the Court referred to certain "borderline examples as to which people's judgment may differ, perhaps acceptable in some communities but not others." The Court mentioned "depiction of a self-help gynecological examination," "nude scenes from a movie" and a "safe sex" program. 116 S. Ct. at 2396-97. The Court concluded that it was "difficult to see how such borderline examples could show a compelling need, nationally, to protect children from significantly harmful materials." Amici's point is that the CDA, worse than the much less restrictive provisions that the Court struck down in *Denver*, makes *criminal* the very kinds of "borderline examples" that the Court recognized might not be "acceptable in some communities."[10] The effect of the CDA is to ban even the "borderline" examples from *all* communities because they are unacceptable in some very intolerant ones, even though they are generally acceptable around the nation.

The government stretches too far when it invents the concept of "cyberzoning" and says the CDA operates like the adult theater ordinances in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). The CDA does not "channel" materials to "adult areas of cyberspace" (U.S. Br. at 32); it makes *criminal* speech that is protected among adults. Moreover, the CDA is not a time, place and manner regulation aimed at containing the "secondary effects" of speech. Unlike *City of Renton* and *Young*, where

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[10] A wide variety of similar examples of speech with societal value that the CDA makes criminal was identified below. *ACLU*, 829 F. Supp. at 852, 855, 871-72.

the cities sought to control crime and protect retail business and property values through geographic zoning of theaters, the CDA criminalizes speech because of its content. As the Court remarked in *City of Renton*, "[i]t is th[e] secondary effect which these zoning ordinances attempt to avoid, *not the dissemination of 'offensive' speech.*" 475 U.S. at 49, quoting *Young*, 427 U.S. at 71, n.34 (emphasis added). Here, it is precisely the "offensive" speech that is prohibited.

B. Using geographic "community standards" for a non-geographic medium means that speech offensive in any community is banned from all communities

Miller's definition of obscene speech that enjoys no First Amendment protection attempted to minimize subjectivity by requiring that offensiveness be judged by "community standards." These standards have come to be *geographic*. *Miller* itself said that it was permissible to use the State of California as the relevant "community." 413 U.S. at 30-31. Other courts have approved the use of "community standards" of a county (*e.g., United States v. Bagnell*, 679 F.2d 826, 836-37 (11th Cir. 1982), *cert. denied*, 460 U.S. 1047 (1983)), and a federal district (*e.g., United States v. Thomas*, 74 F.3d 701, 710-11 (6th Cir.), *cert. denied*, 117 S. Ct. 74 (1996)). But the Internet is a non-geographic medium, and online communications can and do circulate throughout the nation and the world, with the speaker commonly having no idea who might read his or her words or in what geographic community readers might live.[11] In other words, the assumption of *Miller* that

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[11] "An individual sending a message that will be retransmitted by a mail exploder program has no way of knowing the e-mail addresses of other subscribers." *Shea*, 930

"patent offensiveness" will be judged by the standards of a given geographic community, where the defendant intends to sell the offending film or book, simply does not work with the Internet. Applying geographic community standards to speech that is "available" everywhere reduces all speech to what is acceptable in the *least tolerant community* a prosecutor can find.

Amici recognize that *Sable Communications v. FCC*, 492 U.S. 115 (1989), rejected the argument of commercial "dial-a-porn" operators that they would be compelled to tailor their messages to the least tolerant community. 492 U.S. at 124. The argument was that *Miller* was violated because the telephone statute assertedly created an "impermissible *national* standard." The Court cited its cases upholding prohibitions against *mailing* or *broadcasting* obscene materials into certain communities. The Court said that a commercial telephone pornographer was "free to tailor its messages, on a selective basis, if it so chooses, *to the communities it chooses to serve*," and that there was no constitutional impediment to imposing the costs of "screening the locale of incoming calls" on the commercial operator. 492 U.S. at 125 (emphasis added). This reasoning cannot be applied here because the vast majority of Internet speakers (1) are not commercial enterprises, (2) do not "choose" to serve *any* geographic community, and (3) have no means of "screening" who might see their speech. As Judge Dalzell pointed out, "unlike other media, there is no technologically feasible way for an Internet speaker to limit the geographical

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F. Supp. at 927. "[O]ne who posts an article to a news group has no way of knowing who will choose to retrieve it." *Id* at 928; *ACLU*, 929 F. Supp. at 845, 854, 878.

scope of his speech (even if he wanted to), or to 'implement[ ] a system for screening the locale of incoming' requests." *ACLU*, 929 F. Supp. at 878, quoting *Sable*.[12]

Miller was decided on the assumption that the Court was dealing with relatively fixed "works," like movies, books and magazines, that the publisher intends to sell in a given geographic community. *Miller* was decided two decades before the Internet emerged. The Court plainly did not anticipate its application to *interactive* speech, the kinds of computer-mediated human conversations that the Internet medium makes possible and that know no geographic boundaries.

The Conference Report on the CDA states that a different section of the law, § 223(f)(2), which preempts inconsistent state and local regulations, is "intended to establish a uniform national standard of content regulation for a national, and indeed a global, medium . . . " Conf. Report at 191, reprinted at 1996 U.S. Code Congressional & Administrative News, at 204. If this opaque reference was meant to establish "national" standards rather than local "community" standards for judging "patently offensive" speech, this is an odd and highly questionable legislative technique. *See* authorities cited in point III, *supra*. It also is contrary to *Miller*'s rejection of a

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[12] In *United States v. Thomas*, 74 F.3d 701 (6th Cir.), *cert. denied*, 117 S. Ct. 74 (1996), the Sixth Circuit upheld an obscenity conviction involving pictures transmitted by computer from California to Memphis, Tennessee, rejecting the argument that it should "adopt a new definition of 'community' for use in obscenity prosecutions involving electronic bulletin boards." 74 F.3d at 711. The court found "no need" to reconsider this aspect of the *Miller* test because the defendants in *Thomas* in fact "knew" that they were sending the pictures to a specific recipient in Tennessee who had submitted an application and been issued a password before requesting that the particular pictures be sent to Tennessee. *Id*. at 72.

national standard. 413 U.S. at 30 ("our Nation is simply too big and diverse for this Court reasonably to expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists").

When uncoupled from *Miller*'s context of "hard-core," prurient sexual "works" with no societal value, the "patently offensive" standard becomes an engine for the suppression of speech that prosecutors subjectively find objectionable. It cannot stand alone as the test for whether speech is criminal. Whatever its validity as part of the FCC's administrative regulation of commercial broadcasters who voluntarily seek government licenses and submit to such regulations, it cannot be used in a criminal statute applied to ordinary citizens who converse on the Internet. Its vagueness is compounded by "the government's inability to identify the relevant community by whose standards the material will be judged." *ACLU v. Reno*, 929 F. Supp. at 856 (Sloviter, J.); *id.* at 863 (Buckwalter, J.).

Nor is it irrelevant that enforcement of this criminal statute inevitably will involve widespread eavesdropping or other participation by government agents and vigilante groups in the online conversations of ordinary citizens. That is, unlike complaint-activated monitoring of public broadcasts by the FCC, enforcement of the CDA necessarily will involve reading, snooping on and recording the electronic communications of unsuspecting and wholly innocent citizens. For example, when a vigilante group tips law enforcement that a certain news group involves the "patently offensive" discussion of abortion, safe sex or erotic literature, Big Brother government will log on and listen to the conversation, recording at will. When a prosecutor thinks he or she can get a conviction in a particular community intolerant of such discussion,

the conversation can be downloaded – with a mouse click – to that venue. Hundreds of persons' thoughts and ideas will become "evidence" in a criminal prosecution. This will happen even if the "patently offensive" material in fact has no impact whatever on the "community" whose standards will govern and would not even have been downloaded there except for the purpose of prosecution.[13] Thus, not only does the CDA's vagueness invite arbitrary and discriminatory enforcement (*see Grayned v. City of Rockford, supra*, 408 U.S. at 108-09), but the enforcement will include unseemly government surveillance of the private online conversations of ordinary innocent people.

In short, the CDA is not rescued by borrowing from *Pacifica* which in turn borrowed part of *Miller*. Unlike with broadcast, cable and telephone, where there is a long tradition of significant federal regulation, including the need to apply for government licenses to make commercial use of these media, there is no overriding federal interest in policing the content of citizen speech on the Internet. *See* point I, *supra*. The drafters of the CDA, in their haste to suppress images and words that *they* find offensive, blundered far beyond the scope of any legitimate federal interest. Until Congress specifies, in clear terms that give fair notice to speakers, what harm is

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[13] In *United States v. Thomas, supra*, the only person to download the defendant's electronic bulletin board's materials in Tennessee was the postal inspector who initiated the prosecution. 74 F.3d at 705. The defendants in that case knew that they were transmitting the material to Tennessee, because they required an application and password for any transmission. *Id.* at 705, 710, 711. But in most CDA cases, the unsuspecting speaker will have no idea where his or her communications are going, or to whom. See note 11, *supra*.

caused to what minors by what speech, it cannot make "patently offensive" speech a *criminal* offense.

CONCLUSION

The judgment of the court below, finding the Communications Decency Act unconstitutional, should be affirmed.

Respectfully submitted,

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February, 1997

No. 96-511

Supreme Court, U.S.
FILED
FEB 20 1997
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JANET RENO,
Attorney General of the United States, *et al.*,
Appellants,
v.
AMERICAN CIVIL LIBERTIES UNION, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

BRIEF OF AMICI CURIAE ASSOCIATION OF NATIONAL ADVERTISERS, INC. AND THE MEDIA INSTITUTE IN SUPPORT OF APPELLEES

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BRIEF OF AMICI CURIAE ASSOCIATION OF NATIONAL ADVERTISERS, INC. AND THE MEDIA INSTITUTE IN SUPPORT OF APPELLEES

STATEMENT OF INTEREST [1]

Amici have a long history of advocacy in this Court for strong First Amendment protection for facilitating speech and communications in our society, particularly truthful,

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[1] Pursuant to Rule 37 of this Court's Rules, the parties have consented to the filing of this brief in letters that have been filed with the Clerk.

nonmisleading commercial messages for lawful products and services. Although this case concerns indecent speech, the arguments raised by the government pose a substantial threat to First Amendment values fostering commercial speech as well. The government attempts to justify the censorship legislated by the Communications Decency Act of 1996 (the "CDA")[2] as being necessary for the protection of children. That same interest is routinely offered as a justification for restricting commercial speech. In this brief, *amici* explain why a government's legitimate interest in our nation's children should not reduce First Amendment protection for any category of speech, and certainly not for commercial speech.

The Association of National Advertisers, Inc. ("ANA"), the advertising industry's oldest trade association, is the only organization exclusively dedicated to enhancing the ability of business to advertise on a national and regional basis. With more than 5,000 subsidiaries, divisions and operating units, ANA members market a kaleidoscopic array of goods and services and account for a significant percentage of the nation's annual national and regional advertising expenditures. As the nation's principal community of commercial speakers, ANA has long been committed to the advancement of truthful commercial speech designed to permit consumers to make informed and autonomous choices in the marketplace among lawful products and services.

The Media Institute is an independent, non-profit research organization. Through conferences, publications, and filings with courts and regulatory bodies, the Institute advocates a strong First Amendment and competition within the communications industry. The Institute's First Amendment advocacy is not limited to commercial speech issues, and is unrelated to the financial or proprietary interests of any private-party participants.

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[2] The CDA was enacted as Title V of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 501, 110 Stat. 56, 133-35, and will be codified at 47 U.S.C. § 223(a)-(h).

SUMMARY OF ARGUMENT

The government attempts to justify the CDA's restrictions on fully protected speech as necessary to prevent harm to children. Without acknowledging its First Amendment burden of proof, the government claims that the CDA would reduce the supposed harm caused to children by the availability of indecent speech on the Internet, and that alternatives to censorship would not address the purported problem with equal effectiveness. At the heart of the government's argument is a most troubling contention—that the assertion of an interest in the protection of children somehow diminishes First Amendment rights.

To the contrary, regardless of the compelling nature of the interest asserted by a government, its laws must withstand an undiluted degree of constitutional scrutiny. Government may have a compelling interest in shielding children from certain messages, but when pursuit of that interest simultaneously restricts the freedom of adults to communicate, this Court repeatedly has rejected the notion that adults may be reduced to reading only what is fit for children. Instead of allowing adults to be deprived of fully protected speech, the federal constitution entrusts parents,[3] not government, with the right and duty to decide whether and how to permit their children to have access to mature materials. The government can act in these areas only when it proves that parental responsibility and supervision would be clearly ineffective and, even then, the government must act in a narrowly tailored manner that will accomplish a compelling governmental end.

Based on its asserted interest in protecting children, the government argues that the CDA should be upheld as a content-neutral restriction on speech. But the CDA, by its express language, applies solely to speech with inde-

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[3] The word "parents" and its variants as used in this brief include other types of guardians of children.

cent content and so must be subjected to the more rigorous scrutiny applicable to content-based bans. For example, advertising that, based on its content, arguably falls within the CDA's overly broad and imprecise definition of indecency must not be restricted unless the government meets in full the burdens imposed by the *Central Hudson* test.[4] More significantly, the government's argument in this case for reduced First Amendment scrutiny, if accepted, could have a devastating impact on non-indecent advertising for adult products and services. A government that seeks to restrict such speech, whatever its true motivation, would need only to assert a goal of promoting child welfare, and adults could easily lose numerous avenues for self-expression and receipt of information. The government's attempt to squeeze the CDA into the category of content-neutral restrictions should be rejected as a matter of logic and First Amendment jurisprudence.

Several of the government's other arguments also could apply beyond the category of indecent speech, to all speech which relates to activities that may be engaged in lawfully by adults, but not children. Again, at risk are the rights of commercial speakers and their audience to communicate about adult products. Commercial speech, however, raises very different issues of proof for government than does indecent speech. For example, government typically argues that indecent speech harms children immediately upon their exposure to it, but no such argument can be made as to non-indecent commercial speech. Because of this distinction and others discussed below,

[4] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). Many traditional and widely disseminated advertisements might be argued to fall within the CDA's sweeping definition of indecency, which the court below held was unconstitutionally vague. *See* J.S. App. 80a (Sloviter, J.); 84a-85a (Buckwalter, J.). Potentially banned by the CDA, for example, are certain popular and effective advertisements for jeans, underwear and perfume.

amici respectfully urge the Court to consider the precedential impact of its decision on commercial speech rights and avoid using language that might be construed as diminishing those rights where protection of children is involved.

ARGUMENT

I. THE FIRST AMENDMENT APPLIES WITH NO LESS FORCE WHEN THE GOVERNMENT'S ASSERTED JUSTIFICATION FOR CENSORSHIP IS THE PROTECTION OF CHILDREN

A. First Amendment Rights Are Not Diminished Based on the Nature of the Government's Asserted Purpose for Restricting Speech

The apparently good intentions of government do not give it greater latitude to act as a censor. Rather, defenders of speech must never allow their sympathy for a government's goal to lull them into relaxed vigilance. This principle has guided the decisions of this Court, which serves as the bulwark of the First Amendment. Time and again, members of the Court have quoted the warning of Justice Brandeis:

> Experience should teach us to be most on guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachments by men of zeal, well-meaning but without understanding.

Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

Today, would-be regulators of speech routinely attempt to dress up censorship in the cloak of protection of children. Many such restrictions, covering a wide range of products and services, are currently under attack in the courts, regulatory bodies and legislatures, including the CDA itself—all purportedly proposed in the name of

protecting children. Few would disagree with the goals that government seeks to advance with these proposals, although many question the efficacy of achieving these goals through censorship, rather than regulation of conduct or greater deference to the parental role.

More important, the popularity of a government's goal does not provide greater leeway for achieving that goal through censorship. The First Amendment "directs that government may not suppress speech as easily as it may suppress conduct, and that speech restrictions cannot be treated as simply another means that government may use to achieve its ends." *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1512 (1996) (Stevens, J., principal opinion). As a unanimous Court recently stated,

> [w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.

Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 115 S. Ct. 2338, 2350 (1995).

B. This Court Repeatedly Has Held that a Legislature's Asserted Interest in Protecting Children Cannot Trump First Amendment Rights

This is not the first case, nor likely will it be the last, that presents a conflict between First Amendment rights and a government's claim that it must restrict those rights in order to protect children. In contemporary society, where adults and minors are often exposed to the same media, it is difficult to keep communications away from children without simultaneously restricting the rights of adults to communicate with one another. As the government acknowledges, this case presents precisely that conflict: "in the short run, the CDA may impose some burdens and costs on adult-to-adult communication of indecent material." Appellants' Brief at 19. What the government does not acknowledge, however, is that this Court consistently has resolved that conflict in favor of protecting speech. *See Sable Communications of Calif., Inc. v. F.C.C.*, 492 U.S. 115 (1989); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983); *Butler v. Michigan*, 352 U.S. 380 (1957).

In *Butler*, the Court invalidated Michigan's prohibition on the sale of materials "tending to incite minors to violent or depraved or immoral acts, [or] manifestly tending to the corruption of the morals of youth . . . ." 352 U.S. at 381. The Court held that the challenged law impermissibly "reduce[d] the adult population of Michigan to reading only what is fit for children." *Id.* at 383. It added, "[s]urely, this is to burn the house to roast the pig." *Id.*

In *Bolger*, the Court relied on *Butler* to strike down as unconstitutional a federal statute that prohibited the mailing of unsolicited advertisements for contraceptives. *Bolger*, 463 U.S. at 73-74. Noting that the unsolicited advertisements were "entirely suitable for adults," the Court invalidated the statute as an impermissible restriction on commercial speech. *Id.*

This principle again was applied to a restriction on indecent speech in *Sable*. At issue was a federal ban on, *inter alia*, indecent commercial telephone messages, commonly known as "dial-a-porn." After recognizing the government's compelling interest in protecting children, the Court made plain that this interest cannot diminish the free speech rights of adults:

> The Government may serve this legitimate interest, but to withstand constitutional scrutiny, it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms. . . . It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends.

492 U.S. at 126 (citations omitted). In reliance on *Butler* and *Bolger*, the Court struck down the ban because it "has the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear." *Id.* at 131. *See also Denver Area Educ. Telecomm. Consortium v. F.C.C.*, 116 S. Ct. 2374, 2393 (1996) (citations omitted) (noting that "[n]o provision, we concede, short of an absolute ban, can offer certain protection against assault by a determined child," and affirming that the Court has " 'not, however, generally allowed this fact alone to justify reduc[ing] the adult population . . . to [viewing] only what is fit for children.' "); *id.* at 2416-17 (Kennedy & Ginsburg, J.J., concurring in part and dissenting in part) (same).

The three-judge court below correctly concluded that *Sable* requires invalidation of the CDA. As set forth in the court's Findings of Fact, a "wealth of persuasive evidence" proved that compliance with the CDA is "either technologically impossible or economically prohibitive . . . without seriously impeding [the] posting of on-line material which adults have a constitutional right to access." J.S. App. 73a. This Court, by affirming the judgment below, should add this case to the line of precedents that protect mature speech from a paternalistic government that claims it must censor for the sake of children.

The government misleadingly suggests that the decision in *Sable* depended upon the fact that the restriction on "dial-a-porn" operated as a flat ban. Appellants' Brief at 27, 38. *Sable* does not contain any suggestion that a less than complete ban somehow would escape First Amendment scrutiny. Indeed, *Sable* relied on *Bolger* which invalidated a restriction on the mailing of *unsolicited* advertisements for contraceptives, but had no effect on *solicited* advertisements, and clearly was not a complete ban. *Bolger*, 463 U.S. at 61-62. If the partial nature of the ban in *Bolger* had no impact on the outcome in that

commercial speech case, then it must be irrelevant in the context of the CDA's restrictions on fully protected speech. More important, First Amendment rights would be injured if strict scrutiny were avoided whenever a content-based restriction on speech could be characterized as less than complete, just as surely as they are when a restriction's duration is claimed to be tolerable. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury").[5]

The government also mistakenly attempts to avoid the rule of *Butler*, *Bolger*, and *Sable* by relying on this Court's inapposite decision in *Ginsberg v. New York*, 390 U.S. 629 (1968). In *Ginsberg*, the defendant owner of a stationery store who sold an indecent magazine to a 16-year-old boy did not suggest that New York's ban on such sales to youths under the age of 17 affected his ability to sell to adults, and clearly it did not. *Id.* at 634. Thus, *Ginsberg* concerned solely New York's exercise of its police power to protect minors under 17, not, as here, a conflict between that police power and the First Amendment rights of adults. The criminal statute in *Ginsberg* could be and was upheld based on mere rational basis review. *Id.* at 643.

In contrast to the criminal statute at issue in *Ginsberg*, the CDA does impede constitutionally protected com-

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[5] In focusing on whether the CDA is a flat ban, the government appears to be confusing the strict scrutiny test, applicable to content-based restrictions, with the test applicable to content-neutral restrictions. The latter test does inquire as to whether the restriction "leave[s] open ample alternative channels of communication." *See, e.g., United States v. Grace*, 461 U.S. 171, 177 (1983) (citation omitted). As discussed more fully below, however, the government cannot successfully maintain that the CDA, which restricts a certain category of fully protected speech based on its indecent content, is content-neutral and subject to this reduced First Amendment protection.

munications between adults. Unlike the sale of magazines at a stationery store, or the sale of tickets at an adult movie theater, the communication of indecent materials over the Internet does not involve discrete face-to-face exchanges. As the district court held, the speaker on the Internet lacks an economically or technologically feasible means to ensure that his audience does not include persons under the age of eighteen. J.S. App. 73a-74a. Consequently, to guarantee compliance with the CDA, the speaker would be forced to abandon or constrict his communications with the entire audience, including those adults for whom indecent messages are fully protected speech. *Butler, Bolger* and *Sable* prohibit such an abridgment of speech.

This Court's admonition against burning down the house to roast the pig applies with special vigor when the "house" in question is the Internet. This newly-constructed medium, although private, is open to all Americans. Once a speaker enters the Internet, he or she will find a vast interactive community, estimated today at 40 million and expected to grow to 200 million by 1999. J.S. App. 13a. The pervasiveness and accessibility of a medium such as the Internet, characteristics that the government identifies as supporting greater censorship, in fact justify rigorous First Amendment protection. *See* Appellants' Brief at 35-36. The constitutional rights of adults to communicate with one another must be especially free in those media that allow for the most effective communications.

C. The Federal Constitution Entrusts Parents, Not Government, with the Primary Responsibility of Supervising the Exposure of Children to Various Types of Speech

Admittedly, the First Amendment's protection of adult-to-adult communications does increase the opportunities for children to be exposed to such messages. The possi-

bility of exposure should not, however, be viewed negatively, as a "price that we pay" for freedom of speech. Rather, by limiting governmental censorship, the constitution recognizes that parents have both the right and duty to decide whether and how to expose their children to mature messages.

This Court repeatedly has emphasized the preeminent role of parents in the making of child-rearing decisions. More than 70 years ago, the Court recognized that the "liberty" interest guaranteed under the Fourteenth Amendment includes the right of adults to "establish a home and bring up children." *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923) (invalidating Nebraska's law that prohibited the teaching in school of any modern language other than English to any child below the ninth grade). Soon thereafter, the Court more explicitly recognized the "liberty of parents and guardians to direct the upbringing and education of children under their control." *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary,* 268 U.S. 510, 534-35 (1925) (invalidating an Oregon statute requiring all children between ages 8 and 16 to attend public school). The Court added in *Pierce* that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535.

The principles announced in *Meyer* and *Pierce* have been quoted and expanded on in more recent cases. In *Wisconsin v. Yoder,* 406 U.S. 205 (1972), the Court held that the First and Fourteenth Amendments prevent the state from compelling Amish parents to force their children to attend formal high school to age 16. The Court stated that "the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society." *Id.* at 213-14. Similarly, in *Carey v. Popula-*

tion Services International, 431 U.S. 678 (1977), the Court invalidated New York's statute prohibiting, *inter alia*, the sale of contraceptives to anyone under 16, ruling that "[t]he State points to no interest of sufficient magnitude to justify this direct interference with the parental guidance that is especially appropriate in this sensitive area of child development." *Id.* at 708.

The most expansive statement of the reasons underlying the preeminent role of parents appears in *Parham v. J.R.*, 442 U.S. 584 (1979), where the Court upheld Georgia's statute that allowed parents voluntarily to place their children in mental hospitals:

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Id. at 602. This Court's consistent recognition of the preeminent role of parents militates against the constitutionality of provisions, such as the CDA, that take child-rearing decisions out of the hands of parents and place them in the hands of a censoring government.

The proper role of government in this sensitive constitutional area is to support parents in their decision-making, not to supplant them by decreeing what children may see and hear. For example, government may encourage the development of technology or voluntary ratings that will give parents the tools to decide which, if any, indecent materials they will allow their children to receive. Indeed, government must utilize these non-censorship alternatives before it constitutionally can restrict speech. *See*

Sable, 492 U.S. at 126 (government must adopt "least restrictive means" to promote its interest). Even without governmental encouragement, however, the private sector undoubtedly will create the supportive technology that parents want. The district court found that the free market system already is working: "[d]espite its limitations, currently available user-based software suggests that a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be widely available." J.S. App. 42a; *see Shea v. Reno*, 930 F. Supp. 916, 931-34 (S.D.N.Y. 1996).

The protection of parents' child-rearing rights in the area of indecent speech is consistent with the value accorded such speech in the First Amendment hierarchy. At least for adults, indecent materials are fully protected speech. Under the broad definition of indecency in the CDA, "a work need not appeal to the prurient interest or lack serious value to be 'indecent.'" *Shea*, 930 F. Supp. at 935 n.34 (citations omitted); *see* J.S. App. 70a-71a. Enforcement of the CDA would deny to parents the option of allowing their children, including those as old as 17, unrestricted access to materials that may have serious literary, artistic, political or scientific value. Government is simply not in a position to make that decision for the millions of young people across the nation, who are at various stages of maturity and whose parents have widely divergent views of the effects of exposure to indecent speech. Under the law, government may not assume the parental role and responsibilities when parents themselves have the capacity to protect their children.

By affirming the district court's decision, this Court not only will protect the First Amendment freedoms of adults, but also will reinforce the rights of parents to make basic child-rearing decisions without governmental interference masquerading as support.

II. GOVERNMENT MAY NOT TRANSFORM A CONTENT-BASED RESTRICTION ON SPEECH INTO A CONTENT-NEUTRAL RESTRICTION BY CLAIMING TO BE PROTECTING CHILDREN

In an argument with wide-ranging implications, the government contends that its asserted interest in protecting children substantially reduces the level of First Amendment scrutiny to be applied to the CDA. That interest, the government believes, allows it to evade the strict scrutiny applicable to content-based restrictions on fully protected speech, and instead to defend the CDA under the far less protective test applicable to content-neutral restrictions. The government's argument must be rejected.

The First Amendment serves fundamental national interests by treating content-based restrictions on speech as anathema:

> To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."

Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972) (citation omitted). As Judge Learned Hand once observed, the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

For these reasons, the courts apply the strictest level of scrutiny to content-based restrictions on speech. In contrast, content-neutral restrictions may be upheld if they merely serve a significant governmental interest and leave open ample alternative channels for communication of the information. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). The two different tests are appropriate because of the distinct dangers raised by content-based restrictions. When the government discriminates based on content, the dangers are a majoritarian suppression of disfavored or less popular ideas and a resulting distortion of the national debate through which the best ideas should prevail. A content-neutral regulation, however, does not implicate these concerns.

The CDA poses the very dangers that require strict scrutiny of a governmental restriction on speech. The legislators unabashedly proclaimed that they were supporting the CDA because they and some of their constituents do not like the content of indecent speech. Congress wanted to make the Internet "even bigger, and . . . even better, . . . but not for raunchy pornography that would turn most people off." 141 Cong. Rec. S8339-S8340 (daily ed. June 14, 1995) (remarks of Sen. Exon). Passage of the CDA was motivated by the opinion that "some of the information traveling over the Internet is tasteless, offensive, and downright spine-tingling." 141 Cong. Rec. S8345 (daily ed. June 14, 1995) (remarks of Sen. Biden). These statements by Congress demonstrate that the CDA imperils the "bedrock principle underlying the First Amendment"—"that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

In disregard of the facts and the law, the government attempts to characterize the CDA as a content-neutral

restriction on speech. The government argues that constitutional analysis of the CDA is controlled by this Court's two decisions concerning content-neutral zoning restrictions, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). Appellants' Brief at 18, 36-38. *Renton* and *Young* involved challenges by owners of adult movie theaters to zoning ordinances that restricted the permissible locations for such theaters. In those cases, the Court concluded that the legislative purpose did not concern the "content of adult films themselves," *Renton*, 475 U.S. at 47, or the "dissemination of 'offensive' speech," *Young*, 427 U.S. at 71 n.34 (plurality opinion). Rather, the record showed that the municipal governments were concerned with the "secondary effects" of the movie theaters, such as an increase in crime and a reduction in property values. *Renton*, 475 U.S. at 48; *Young*, 427 U.S. at 55. The Court reviewed the zoning ordinances in both cases under the less rigorous content-neutral test because the ordinances were designed to prevent these secondary effects, "not to suppress the expression of unpopular views." *Renton*, 475 U.S. at 48.

In contrast, the government here should have abandoned its "secondary effects" argument immediately after conceding that "it is true that the harm to children [that the CDA is designed to address] is a consequence of the indecent material and therefore could in a sense be viewed as a primary rather than a secondary effect." Appellants' Brief at 37. Instead, the government offers two purported "secondary effects" that actually underscore that the CDA is content-based. First, the government claims that the purpose of the CDA is to "ensur[e] that parents are not deterred from allowing their children to use the Internet." *Id.* But this is just another way of saying that the government is concerned about the *content* of the restricted speech. The government is assuming that parents will not allow their children to use the Internet because of the

purported harm caused by the *content* of indecent materials.

As its second attempt to convert the CDA into a content-neutral restriction, the government argues that "[b]ecause there is no First Amendment right to disseminate indecent material to children, however, the harmful effect of such materials on children is better understood as a secondary effect of constitutionally protected adult-to-adult communication." *Id.* at 37. Again, that argument ignores the dispositive and undisputed fact here: the CDA discriminates among fully protected speech based solely on its content. As explained above, such content-based discrimination threatens vital First Amendment values by distorting the national discourse. Moreover, the government's argument is inconsistent with *Sable*, where this Court applied strict scrutiny even though the government's interest was, as here, the protection of minors from indecent messages. 492 U.S. at 126.

The falseness of the analogy that the government draws between this case and the zoning cases is illuminated by constructing a true analogy. For *Renton* and *Young* to be like this case, the municipalities would have been focused instead on the purported harm caused to minors by exposure to adult films and would have banned the sale to minors of tickets for screenings at adult theaters. If the ban were limited to minors, such restrictions probably would be constitutional under *Ginsberg* and the municipalities would not have needed a "secondary effects" argument.[6] In turn, for this case to be like *Renton* and *Young*, the government would have passed the CDA to address harms caused by having a computer in the home, separate and apart from the content of materials available

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[6] On the other hand, if the ban on ticket sales were not limited to minors, such restrictions would be unconstitutional under *Butler* because, like the CDA, they would impermissibly restrict adults' rights.

on the computer. Obviously, that was not Congress's goal.

More troubling from the perspective of *amici*, the government's "secondary effects" argument, if successful, would have grave implications for the protection of any speech concerning activities in which adults, but not minors, may lawfully participate. For example, many would argue that minors do not have First Amendment rights to receive advertising messages concerning adult products or services, such as guns, tobacco products, promotional sweepstakes, Indian casinos, alcohol beverages, or many fee-based telephone services (such as "900" services). But, under the government's reasoning, as long as a legislature claimed to be restricting such advertisements in order to protect minors, it would be able to deprive adults of those messages, subject only to the limited constitutional protection afforded content-neutral restrictions on speech. The First Amendment's protection of truthful, nonmisleading advertising for lawful products and services must not be weakened by acceptance of the government's "secondary effects" argument in this case.

Try as it might, the government cannot escape the fact that the CDA is a content-based restriction on speech. For it to be upheld, the CDA must pass the strict scrutiny afforded fully protected speech. Anything less would threaten First Amendment rights in this and countless future cases involving the restriction of mature messages.

III. THE COURT'S DECISION IN THIS CASE SHOULD BE CAREFULLY CRAFTED SO AS TO NOT DIMINISH COMMERCIAL SPEECH RIGHTS

Regardless of the ultimate outcome of this case, a risk exists that any negative language limiting the First Amendment rights of appellees may have a spillover effect on the protection of non-indecent commercial speech. Government often asserts the same interest in cases involving

restrictions on advertising—the protection of children—that it uses to justify restrictions on indecent speech. The two areas, however, raise dissimilar issues of proof in two key respects.

First, whenever a content-based restriction on speech is challenged, the government must show that the speech in question actually causes the asserted harm and that its restriction will alleviate that harm. *See Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993); *Sable*, 492 U.S. at 126. Would-be censors of indecent speech argue, and many agree, that such speech harms immature minors immediately upon exposure. *See F.C.C. v. Pacifica Found.*, 438 U.S. 726, 746 n.23 (1978) (Stevens, J., concurring) ("Verbal or physical acts exposing those intimacies [*i.e.*, certain bodily functions] are offensive irrespective of any message that may accompany the exposure."); *id.* at 758 (Powell, J., concurring) (noting that indecedent speech "may have a deeper and more lasting negative effect on a child than on an adult").

In contrast, even the opponents of advertising for adult products cannot demonstrate any immediate impact on children, so they routinely assert an attenuated and unproven chain of presumptions, starting with exposure to the advertising, to recognition of likable symbols or figures, to creation of favorable attitudes, to stimulation of desire for the product, to illegal purchase or use outside the detection of parents.

Second, the deep differences between indecency and commercial speech are also critical to the First Amendment inquiry concerning the availability of non-speech-related alternatives to advance the government's asserted purpose. *See Edenfield*, 507 U.S. at 773; *Sable*, 492 U.S. at 114. The harm purportedly caused by indecent speech could perhaps most directly be addressed by restricting children's access to the immediately impactive speech itself, assuming that appropriate means to do so were available. In contrast, the harm purportedly caused by advertising for

adult products is much more directly addressed by non-speech-related alternatives to reduce access to, and use of, the products, such as better law enforcement, education and parental supervision. *See 44 Liquormart*, 116 S. Ct. at 1510 (Stevens, J.); *id.* at 1522 (O'Connor, J., concurring in the judgment); *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1593-94 (1995).

These divergent issues of proof raised by restrictions on indecency and commercial speech, *amici* respectfully submit, require this Court to be wary of making general statements in this case about government's ability to restrict speech in order to protect children. Specifically, if the Court chooses to rely on *Pacifica*, it should make clear that the factual basis of that decision was limited to the indecency context. In *Pacifica*, the Court upheld restrictions on the times during which radio broadcasts could include indecent speech. The Court based its analysis on the immediate harm caused to young children by exposure to indecent speech. As the Court noted, "to say that one may avoid further offense by turning off the radio when he hears indecent speech is like saying that the remedy for an assault is to run away after the first blow."[7] *Pacifica*, 438 U.S. at 748-49. In contrast, no one can claim that exposure to advertisements for adult products causes immediate harm. *Pacifica* would have been an entirely different case if the restricted speech were non-indecent advertisements for George Carlin's album or his performances.

The danger of *Pacifica* and other indecency cases being used to uphold restrictions on commercial speech is not merely hypothetical, as demonstrated by the Fourth Circuit's decision on remand in *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325 (4th Cir. 1996). That case in-

[7] Here, as the court below noted, presently available technology enables parents to protect children from that "first blow." J.S. App. 42a. This is one more reason why the CDA is not narrowly tailored.

volves a First Amendment challenge to a zoning ordinance that restricts the placement of truthful, nonmisleading outdoor advertisements for alcohol beverages. This Court vacated the Fourth Circuit's initial opinion upholding the ordinance and remanded the case for further consideration in light of *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996). *Anheuser-Bush, Inc. v. Schmoke*, 116 S. Ct. 1821 (1996). On remand, the previously unanimous panel split, but the majority again upheld the ordinance, mostly readopting its prior opinion with one significant addition. The majority stated that, even in the commercial speech context, this Court's indecency cases require that children be given "special solicitude in the First Amendment balance." 101 F.3d at 329 (*citing, inter alia, Pacifica, Denver Area, Ginsberg*, and *Osborn v. Ohio*, 495 U.S. 103 (1990)).

While there certainly are contexts in which government has a compelling interest in protecting children, the notion that First Amendment rights are somehow reduced when a government asserts that interest is troubling enough in the indecency context.[8] Extension of that notion to truthful, nonmisleading commercial speech for lawful products and services would reflect an impermissible undervaluing of the rights of advertisers and consumers. *Amici* respectfully urge the Court not to use language in deciding this case that may be construed as implying any greater latitude for government to restrict commercial speech rights when it invokes an interest in the protection of children.

[8] This is particularly so when, as here, indecency is defined so broadly as to include materials that do not appeal to the prurient interest and have serious literary, artistic, political and scientific value. *Shea*, 930 F. Supp. at 935 n.34 (citations omitted); *see* J.S. App. 70a-71a.

CONCLUSION

The CDA is a content-based restriction on fully protected speech. It is unconstitutional because the government has not satisfied the strict scrutiny that courts apply in reviewing such restrictions. The government cannot avoid that strict scrutiny by claiming that it designed the CDA to protect children. The decision of the district court should be affirmed. In any event, this Court's decision should be carefully crafted so as to not diminish commercial speech rights.

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 20 1997
CLERK

No. 96-511

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JANET RENO, ATTORNEY GENERAL OF
THE UNITED STATES, *et al.*,
Appellants,

v.

AMERICAN CIVIL LIBERTIES UNION, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEES

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February 20, 1997

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

29 pp

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEES

Pursuant to Rule 37, the Chamber of Commerce of the United States of America respectfully submits this brief *amicus curiae* in support of appellees.[1]

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, sector, and region. Ninety-six percent of the Chamber's members are businesses with less than 100 employees.

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[1] Counsel for both appellants and appellees have consented to the participation of amicus in this case, as evidenced in letters on file with the Court. The law firm representing amicus also has served as one of the counsel for appellee Prodigy Services Company in this litigation.

American businesses are among the largest users of information technology products and services, and constitute a core constituency of interactive computer service providers and users. Accordingly, they are deeply interested in the legal standards that govern permissible communications on computer networks. American businesses have an especially strong concern about statutes, such as the Communications Decency Act, that impose criminal penalties based on the content of communications transmitted or displayed on interactive computer services.

INTRODUCTION AND SUMMARY OF ARGUMENT

The development of interactive computer services—and the Internet in particular—has sparked an information explosion. It has resulted in the development of an unprecedented, seamless, instantaneous web of global communications. Government intrusiveness into communications on this vital medium threatens to stifle the evolution and efficacy of this information infrastructure and the competitiveness of American business. The imposition of sweeping *criminal* penalties based on the content of communications on these networks, under extremely broad and imprecise statutory standards, would produce a chilling effect on business use of online communications, and severely threaten the development of this important infrastructure.

American businesses have a critical interest in ensuring that standards of liability governing communications on interactive computer services, including both the Internet and private networks, do not interfere with the vitality and freedom that are crucial to business performance and competitiveness in this emerging medium. Increasingly, all industries are information technology industries. The business use of computers and online systems is growing at an unprecedented rate. The rapid growth of the Internet and interactive computer communications as vehicles for intra-corporate and intercorporate communications, marketing, advertising, and electronic commerce, has

made the goal of preserving these media free of stifling government interference critical to American business. The ability to use state-of-the-art information technology unfettered by government intervention and economically onerous requirements is essential to American competitiveness and efficiency. American businesses must not be burdened by government controls on speech that put them at a serious disadvantage in the global market.

The Communications Decency Act ("CDA"), Pub. L. No. 104-104, § 502, 110 Stat. 56, 133 (1996) (to be codified at 47 U.S.C. § 223), would jeopardize the computer communications that are increasingly crucial to American businesses. The CDA would impose a criminal felony penalty of up to two years in prison and a substantial fine for "indecent" or "patently offensive" computer communications or displays, as determined "in context" and by "contemporary community standards," that are transmitted or "display[ed] in a manner available" to those under 18 years of age. 47 U.S.C. §§ 223(a) & (d). These standards of criminal liability are excessively broad and vague. The Act would ignore the decentralized nature of the Internet and other interactive networks, impose "command and control" style censorship on all interactive computer communications, and threaten a wide range of legitimate business communications. Moreover, the CDA's intrusiveness and constitutional infirmities are not rescued by its defenses, which are not feasible technologically or economically for businesses in many circumstances and which similarly rely upon inadequately defined standards.

The government interference proposed by the CDA, unprecedented in its intrusion on this medium and in its application to a virtually limitless range of communications, thus would have a stultifying effect on the development of this critical resource and the competitiveness of American business interests. The Chamber of Commerce of the United States strongly supports the objective of protecting children. Regrettably, however, the CDA is not

crafted with sufficient precision or narrowness to serve the government's asserted objective in a constitutionally permissible manner.

ARGUMENT

I. UNITED STATES BUSINESS HAS A VITAL INTEREST IN THE STANDARDS APPLICABLE TO INTERACTIVE COMPUTER SERVICES.

In order to understand the importance of maintaining a free flow of communications on the Internet and other interactive computer services, it is essential to understand two central characteristics concerning the role of American businesses in the online computer environment. First, because of the increasing penetration of interactive computer communications in every industry sector, virtually all businesses have a substantial interest in such communications. Second, because of the global reach of computer communications and the prevalence of such communications in industries worldwide, interactive computer communications are increasingly vital to American businesses competing in the global economic market. Particularly because of the decentralized nature of the Internet and other online communications, government intrusion would have a harmful impact on essential business communications and American competitiveness.[2]

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[2] Section 223(d) of the Communications Decency Act applies to all "interactive computer service[s]," 47 U.S.C. § 223(d); the Act defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(e)(2). Section 223(a) of the Act applies to communications made by "telecommunications device," 47 U.S.C. § 223(a); the lower court concluded that "telecommunications device" as used in the Act includes a computer modem. *ACLU v. Reno*, 929 F. Supp. 824, 828 n.5 (E.D. Pa. 1996).

A. All Industries Are Now Information Technology Industries.

Interactive computer services play at least three fundamental roles for American businesses: (1) a medium for communications within the workplace; (2) a medium for communications regarding industry information and developments; and (3) a medium for commerce.

With respect to communications in the workplace, the use of interactive computer services has grown—and continues to grow—dramatically. The number of Americans employing electronic messaging in the workplace has been estimated at over 37 million.[3] By the year 2000, over 82 million Americans, connected by over 18 million computer systems, both independent and interconnected, will communicate by electronic messaging in the workplace.[4] A 1995 survey by the Chamber of Commerce's Telecommunications Infrastructure Task Force of thousands of large and small business users from all 50 states and diverse industry sectors—the most comprehensive study of business computer use ever undertaken—revealed that fully 95% of the respondent businesses used computer workstations; 74% had computer modems.[5] 81% of the respondent businesses anticipated using electronic mail within five years; 39% used electronic mail in the workplace already.[6] Increasingly, "virtual offices" via online computer systems are replacing bricks and mortar, and small businesses are using this technology to form "virtual corporations" to compete against larger corporations.

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[3] Electronic Messaging Association, *EMA Market Research Survey* 47 (1996).

[4] *Id.*

[5] U.S. Chamber of Commerce & Ernst & Young LLP, *The Business Users' Perspective on the National Information Infrastructure* 10 (1995).

[6] *Id.* at 13.

Interactive computer systems for intra-corporate communications are becoming the norm in almost all industries. Corporate communications range from the dissemination of official corporate policies to internal business discussions and information transfers to informal workplace conversation; in addition to their other functions, interactive computer services are replacing the office "water coolers" of the past.[7]

Numerous American businesses, both large and small, employ 17-year olds and 16-year olds for a wide variety of tasks and permit these employees to have access to corporate communications networks. In addition to specific employment-related tasks, business has a vital interest in the education of American youth and its future workforce. The technologically driven workplace of the 21st century will demand computer-literate workers.

With respect to external communications, businesses are increasingly interconnected to other online networks, such as industry networks and external information providers. Industries stay apace of daily developments and emerging trends through the use of World Wide Web sites, electronic bulletin boards, automatic mailing list services ("listservs"), intercorporate communications, consumer e-mail, and chatrooms.[8] Businesses increasingly offer employees direct access to the Internet and other online networks. By providing access to such information, businesses secure the availability of an almost infinite amount of knowledge and communications; by transmitting information on such networks, businesses make information—

[7] Intra-corporate computer communications also are the communications lifeline of the increasing number of employees who "telecommute." Electronic Messaging Association, *EMA Market Research Survey*, at 48-50.

[8] The Chamber of Commerce of the United States itself maintains a website providing a wide variety of information about policies and programs to members and non-members. <http://www.uschamber.org>.

and, increasingly, commercial interaction—available to a similarly limitless audience.[9]

With respect to commerce and marketing, interactive computer systems are becoming a marketplace of choice for a wide range of companies and consumers, providing fora for marketing, advertising, and increasingly, direct commerce. Indeed, a recent government study estimated that $200 million in commerce was conducted over the Internet in 1995, with a likelihood of billions of dollars in commerce by the turn of the century.[10] In addition to transactions for the exchange of tangible goods, the marketplace for "content" such as software, online publications, and audio and audiovisual recordings likewise will develop and expand. Although certain transactions take place by credit card, the future of cyber-commerce likely also will include the use of "cybercash," a new form of digital currency. Significantly, numerous electronic commerce communications involve no financial transactions.

This dependence on computer communications is not confined to any type of industry or size of business. Users of computer communications reflect the proliferation of technology in virtually every industry sector, such as

[9] As the district court found, "Internet resources and access are sufficiently important to many corporations and other employers that those employers link their office computer networks to the Internet and provide employees with direct or modem access to the office network (and thus to the Internet). Such access might be used by, for example, a corporation involved in scientific or medical research or manufacturing to enable corporate employees to exchange information and ideas with academic researchers in their fields." *ACLU v. Reno*, 929 F. Supp. at 832-33, Finding of Fact ¶ 14.

[10] The President's Information Infrastructure Task Force, *A Framework for Global Electronic Commerce* 2 (Dec. 11, 1996) (citing American Electronics Association/American University, *Internet Commerce* (Sept. 1996)) <http://www.iitf.nist.gov/elec-comm/glo_comm.htm>.

health care, general retail, finance, manufacturing, aerospace, transportation, and energy. Businesses dependent on information technology range from the largest Fortune 500 companies to the smallest entrepreneurs. Indeed, in light of the low barriers to access presented by such networks as the Internet, reliance on interactive computer services is especially important for start-up ventures and new competitors.[11]

Finally, in addition to extensively using interactive computer systems, American businesses also produce the hardware and software that drive the Internet. Domestic businesses are at the worldwide forefront of all phases of Internet technology, including software development, computer manufacturing, local and network messaging, and global public and private network services.

B. The Ability To Use State-Of-The-Art Information Technology Unfettered By Government Intrusiveness Is Essential To American Competitiveness.

The global computer network places American businesses in immediate communication with businesses and consumers around the world. Logging on to the Internet provides instant access to computer sites and individual computers across the globe. This characteristic of interactive computer communications offers tremendous potential for reducing business transaction costs and expanding markets from a local to a global scale. Approximately 40% of host computers worldwide are located outside of the United States.[12]

Government intrusion threatens to disrupt and impede participation in this global medium and in international

[11] *See, e.g., ACLU v. Reno*, 929 F. Supp. at 843, Finding of Fact ¶ 76 ("[T]he Internet provides an easy and inexpensive way for a speaker to reach a large audience, potentially of millions. The start-up and operating costs entailed by communication on the Internet are significantly lower than those associated with use of other forms of mass communication.").

[12] *ACLU v. Reno*, 929 F. Supp. at 831, Finding of Fact ¶ 3.

trade. Indeed, the federal government itself recently recognized this fundamental principle. The proposed "Framework for Global Electronic Commerce"—a collaborative effort by a broad range of departments and agencies in the Executive Branch—expressly recognizes the importance of limiting government intrusion in the Internet. The Framework identifies, as a major potential obstacle to American commercial development and utilization of interactive computer networks such as the Internet, "the possibility that governments will impose disparate and extensive regulations on the Internet . . . such as . . . content restrictions" and "the lack of a predictable legal environment governing transactions and resulting concerns about . . . liability."[13] Rather than command-and-control content restrictions, the Framework embraces a "non-regulatory, market-oriented approach to electronic commerce," and supports "[e]mpowering consumers to manage questions of content."[14]

As the federal government's own proposed "Framework" recognizes, in light of the seamless nature of global computer communications, government intrusiveness, particularly into content, impedes participation in the global medium, and shackles the competitiveness of American business.

II. THE STANDARDS OF LIABILITY OF THE COMMUNICATIONS DECENCY ACT ARE CONSTITUTIONALLY INADEQUATE AND THREATEN TO PENALIZE PERMISSIBLE COMMUNICATIONS.

In light of their extensive use of, and dependence on, online computer networks, the Communications Decency Act raises grave concerns for American businesses. First, the unprecedented scope of the government intrusion reflected in the CDA is fundamentally antithetical to the

[13] The President's Information Infrastructure Task Force, Executive Summary, *A Framework For Global Electronic Commerce* 1 (Sept. 1996) <http://www.iitf.nist.gov/eleccomm/exec_sum.htm>.

[14] *Id.* at 2.

freedom that has permitted the phenomenal growth of this medium. Second, the broad and vague standards adopted by the CDA are paradigms for the type of regulation that can cripple business operations and that cannot withstand constitutional scrutiny. Third, the defenses in the statute are inadequate to salvage its constitutionality.

A. The CDA's Intrusiveness Is Inconsistent With The Freedom That Has Characterized Interactive Media Communications.

The Internet and other online computer networks have flourished in an environment of liberty and free speech.[15] As the district court found, "[i]t is no exaggeration to conclude that the content on the Internet is as diverse as human thought." *ACLU v. Reno*, 929 F. Supp. at 842, Finding of Fact ¶ 74. The district court also emphasized that this explosion of knowledge and information has resulted from a decentralized system, and the absence of centralized authority censoring content. "No single entity—academic, corporate, governmental, or non-profit—administers the Internet. . . . There is no centralized storage location, control point, or communications channel for the Internet, and it would not be technically feasible for a single entity to control all of the information conveyed on the Internet." *Id.* at 832, Finding of Fact ¶ 11.[16]

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[15] As with other media, criminal prohibitions against obscenity and child pornography apply to interactive computer services (*see, e.g., United States v. Thomas*, 74 F.3d 701 (6th Cir.), *cert. denied*, 117 S. Ct. 74 (1996) (obscenity prosecution)). The Chamber of Commerce fully supports the criminal prohibitions against obscenity and child pornography, which are *not* at issue in this case. *See ACLU v. Reno*, 929 F. Supp. at 829.

[16] *See also ACLU v. Reno*, 929 F. Supp. at 838, Finding of Fact ¶ 46 ("Running on tens of thousands of individual computers on the Internet, the [World Wide] Web is what is known as a distributed system. The Web was designed so that organizations with computers containing information can become part of the Web simply by attaching their computers to the Internet and running appropriate World Wide Web software. No single organization controls any membership in the Web, nor is there any single centralized point from which individual Web sites or services can be blocked from the Web.").

Thus, the genius and defining characteristic of this system has been its openness and accessibility.

In sharp contrast, the CDA creates the unprecedented prospect of criminal liability, punishable as a felony by up to two years in prison and substantial fines, for particular computer communications or displays that a federal prosecutor in an unknown jurisdiction may deem "indecent" or "patently offensive." Specifically, the CDA prohibits the transmission of material that is "indecent" to individuals under the age of 18 by a "telecommunications device" (47 U.S.C. § 223(a)(1)(B)); the use of an interactive computer service to send or "display in a manner available to" those under 18, material that, "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication" (47 U.S.C. § 223(d)(1)); and any knowingly "permit[ted]" use of a telecommunications facility for such purposes (47 U.S.C. §§ 223(a)(2) & 223(d)(2)).

The CDA thus represents government intrusion into online computer use on a massive scale and under a broad and undefined standard. The only interactive computer communications at issue are communications that are entirely permissible between adults—as noted, the challenge to the statute does *not* address such material as obscenity, which is prohibited for all persons. Depending on how individual prosecutors and juries interpret such concepts as "context," "contemporary community standards," and "patently offensive," moreover, the statute could apply to a wide range of socially beneficial, interactive computer communications, including subjects such as information about AIDS, breast cancer, serious literature,

discussion of the "seven dirty words" in this Court's *Pacifica* decision (*FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)), and material in the Carnegie Library's online collection. *See, e.g., ACLU v. Reno*, 929 F. Supp. at 853 (Sloviter, C.J.); *id.* at 871 (Dalzell, J.).

Thus, even before addressing the particular difficulties with the CDA's standard of criminal liability, it is important to recognize that the broad and intrusive restriction imposed by the CDA is fundamentally hostile to the freedom and openness that have characterized the Internet and other online networks.

B. The Standards Of The Communications Decency Act Are Excessively Broad And Vague.

American businesses represented by the Chamber of Commerce are responsible corporate citizens who wish to comply fully with the law. In order to do so, however, the standards for criminal prohibitions must be clear and readily ascertainable to businesses large and small. Moreover, the criminal standards must be sufficiently narrow to ensure that permissible communications are not at risk.

The scope of criminal prohibitions of the CDA encompasses potentially every communication—internal or external—that businesses make by computer. Almost every electronic message sent by computer is potentially accessible by persons under 18 and hence subjects the sender to potential liability. Similarly, any material posted to a website, listserv, or electronic bulletin board, or otherwise made available within a company, an industry, or to the general public, could subject the sender to liability. Material retrieved from the Internet or other systems and placed on a company system also could prompt liability.[17]

Indeed, United States businesses originated an estimated 350 *billion* interactive computer communications in 1996,

[17] For example, providing employees with access to infringing domestic or foreign material, such as graphic medical research, could give rise to liability.

a figure which grows with each passing year.[18] The sheer volume and diversity of origins of such communications make universal monitoring impossible.

The nature of interactive computer communications also renders the need for certain, bright-line standards of potential liability crucial. Interactive computer communications typically take place directly between users, without the intervention of administrators or overseers, and often take place in or in close proximity to "real time." For this reason as well, the vast majority of the hundreds of millions of messages that cross interactive computer services each day are not, and cannot be, "screened," much less fully reviewed by legal counsel. It is simply infeasible for the millions of business users to make judgments involving complicated analyses of legal standards of "indecency" or "patently offensive" material under "contemporary community standards" and apply those standards to interactive computer communications prior to each such communication. Nevertheless, under the CDA, businesses would face potential criminal liability for the available display of such messages, and business managers could face up to two years in prison.[19]

Indeed, the vagueness and overbreadth of liability under the CDA are clearly illustrated by the striking inability of government attorneys and expert witnesses to tell the lower court whether particular examples

[18] Electronic Messaging Association, *EMA Market Research Survey*, at 45. By the year 2000, an estimated 1.2 trillion domestic interactive computer business communications will be sent annually. *Id.*

[19] We note that the parties and *amici* have devoted hundreds of pages to interpretation of the standard of liability under the two provisions at issue here, including the meaning of "patently offensive as measured by contemporary community standards." In view of both the volume of messages on interactive computer services and their often "real time" nature, employers are incapable of such analysis, much less its application on an a priori, message-by-message basis.

constituted infringing material under the CDA, much less whether local prosecutors or juries applying "community standards" nationwide would seek to criminalize such communications. *See, e.g., ACLU v. Reno*, 929 F. Supp. at 864 (Buckwalter, J.). Despite the government's own inability to confirm whether specific examples meet the standard of liability under the CDA, businesses and their employees would be required to make such assessments, under pain of criminal liability.[20]

Furthermore, numerous businesses transmit discussions or visual depictions that might be considered "indecent" or "patently offensive" because of the nature of the product or topic of discussion involved. As recently as the 1980's for example, the federal government attempted to prohibit unsolicited mailing of contraceptive advertisements.[21] Companies providing information regarding similar products might be transmitting material considered "patently offensive" or indecent to certain communities or by certain prosecutors. Discussion of such conditions or treatments as breast and prostate cancer, reconstructive surgery, penile implants, digestive diseases and related

[20] The CDA's separate criminal prohibitions on "indecency" in section 223(a) and "patently offensive" material in section 223(d) contribute to the confusion created by the respective definitions. As Chief Judge Sloviter observed, although the case has been decided to this point on the assumption that the meanings of the provisions are identical, the term "indecent" is not defined in the CDA, "[n]or does section 223(a) contain the phrase 'in context'," which is contained in the section 223(d) "patently offensive" section. *ACLU v. Reno*, 929 F. Supp. at 850 (Sloviter, C.J.). "The failure to define 'indecent' in section 223(a) is thus arguably a negative pregnant and subject to the rule of construction" that the disparity in terms is intentional and is intended to convey a difference of intention in the respective statutory provisions. *Id.* at 850 (citing *Field v. Mans*, 116 S. Ct. 437, 442 (1995); *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991); *Russello v. United States*, 464 U.S. 16, 23 (1983)). *See also ACLU v. Reno*, 929 F. Supp. at 861 (Buckwalter, J.)

[21] *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 61 (1983).

conditions, sexually transmitted diseases, contraceptives, birth control, and any other product or service relating to "sexual or excretory activities or organs" might be deemed "patently offensive," subjecting those responsible for such material to two years' imprisonment.[22] Advertising of such products or services, maintaining electronic bulletin boards, listservs, or discussion groups of problems related to such topics, and even transmitting of such information for purposes of telemedicine or education might be interpreted by some communities or prosecutors as indecent or patently offensive, despite (or because of) their "context"; even without originating such information, any business that "display[ed]" such material "in a manner available" to an individual under 18 would be at risk of criminal prosecution.[23]

Indeed, the CDA threatens one of the principal benefits of the Internet and interactive computer services: the rapid exchange of critical business information and ideas and the insights derived from displaying and communicating information, receiving responses, and developing discussions among interested, but previously unknown, participants. A researcher on the Internet, for example, might learn of a corporation's scientific or medical discovery in a field that relates to bodily functions, including sexual and excretory functions and organs, and respond with pertinent

[22] The use of interactive computer services by the health care industry is especially important; fully one-seventh of the nation's economy currently involves health care. Health Insurance Association of America, *Source Book of Health Insurance Data 1995* 6-7 (1996). The CDA could severely curtail increasing use of telemedicine, with social consequences for America's health and economic consequences for the health care industry.

[23] It is, of course, impermissible, as a result of concerns about access by minors, to effectively limit communications between adults to the level appropriate to children. *See, e.g., Sable Communications of Calif., Inc. v. FCC*, 492 U.S. 115, 126-27, 131 (1989); *Bolger*, 463 U.S. at 74; *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

and valuable information.[24] Such communication, which has great social value, is possible on interactive computer services only if there is broad accessibility to information and messages by an expansive audience of potential recipients. Such accessibility is threatened by the broad and vague standards of the CDA. In an environment of uncertainty regarding criminal liability, businesses will face strong incentives to minimize their risk to the greatest extent possible, even if that ultimately means pulling the plug on online systems.

As noted, moreover, numerous information technology-dependent companies employ 16-year olds and 17-year olds as interns or employees. *See* page 6, *supra*. The mere use of expletives in e-mail sent to or available to minor employees could subject such companies to liability.[25] Thus, an informal office "water cooler" conversation, if conducted instead by electronic mail, could land the speaker in prison for two years and subject the business to extensive liability. Similarly, displays available on company computer systems might incur liability. Business would face the dilemma of either banning young employees from office communications and denying them concomitant training and experience in computer technology, or facing potential criminal liability. The CDA thus would impose a chilling environment on businesses, forcing them to err on the side of exclusion to avoid uncertain liability, thereby depriving our nation's youth of the technological education and training they will need for career employment and depriving American businesses of a skilled and well-trained future workforce.

The government contends that the definitions of indecency and "patently offensive" are neither vague nor over-

[24] *Cf. ACLU v. Reno*, 929 F. Supp. at 832-33, Finding of Fact ¶ 14.

[25] An expert witness for the government opined that mere expletives could prompt criminal liability. *ACLU v. Reno*, 929 F. Supp. at 864 (Buckwalter, J.).

broad because such definitions must be considered "in context." Gov't Br., 48-51. *See* 47 U.S.C. § 223(d)(1) (prohibiting display of material that "in context" is "patently offensive as measured by contemporary community standards"). The use of the modifier "in context" for the "patently offensive" definition, however, does not provide the requisite narrowness and clarity.[26] As Judge Buckwalter observed, the inclusion of that phrase, itself undefined, "does nothing to clarify the provision, for it fails to explain which context is relevant."[27] Significantly, however, it is clear that, "[u]nlike in the obscenity context, indecency has *not* been defined to exclude works of serious literary, artistic, political or scientific value, and therefore the Government's suggestion that it will not be used to prosecute publishers of such materials is without foundation in the law itself."[28]

The government's reliance on an explicit or implied limitation of liability to material "in context" is particularly unsettling for businesses. Does the "context" of a discussion on the World Wide Web render acceptable material that a prosecutor might otherwise find "patently offensive"? Does the "context" of a business communi-

[26] The "indecency" provision does not itself contain this limitation. *See* note 20, *supra; see also ACLU v. Reno*, 929 F. Supp. at 850 (Sloviter, C.J.).

[27] *ACLU v. Reno*, 929 F. Supp. at 864 (Buckwalter, J.); *see also id.* (noting that "'[c]ontext' may refer to, among other things, the nature of the communication as a whole, the time of day it was conveyed, the medium used, the identity of the speaker, or whether or not it is accompanied by appropriate warnings.").

[28] *Id.* at 863. To the extent that the Conference report suggests that redeeming value would preclude coverage under the CDA, Conference Report on S. 652, Telecommunications Act of 1996, H. Rep. 104-458, at 189 (Jan. 31, 1996) ("Conf. Rep."), nothing in the criminal liability standard of the statute provides such a limit; indeed, the conferees explicitly rejected such a limitation, *see* note 29, *infra*, and neither the government nor its amici contend that redeeming value necessarily precludes criminal liability under the CDA. *See* Gov't Br. at 50; Br. of Amici Sen. Coats, *et al.*, at 13.

cation sent intra-company or inter-company that contains necessarily graphic material or potentially infringing expletives render it nonetheless acceptable?

Indeed, the breadth and vagueness of the criminal standards are especially clear in light of proposed limitations that Congress explicitly rejected. The conferees on the CDA expressly rejected a proposed limitation of liability to (i) material that is pornographic (*i.e.*, appealing to prurient interests) and (ii) material that "taken as a whole, lacks serious literary, artistic, political or scientific value."[29] To read such limitations into the legislation would require a wholesale rewriting of the CDA, which the lower court properly rejected as beyond the courts' prerogative.[30]

Far from providing any clarifying limitation, moreover, the statutory modifier "as measured by contemporary community standards" merely compounds the uncertainty and variability of the criminal liability standard. The nature of interactive computer communications makes it often impossible to determine the geographic origin or destination of communications. Furthermore, "[o]nce a provider posts its content on the Internet, it cannot prevent that content from entering any community." *ACLU v. Reno*, 929 F. Supp. at 844, Finding of Fact ¶ 86. The

[29] The conferees rejected a "harmful to minors" standard, based on the Court's ruling in *Ginsberg v. New York*, 390 U.S. 629, 641-43 (1968), that would have limited liability under the CDA to a communication that (1) taken as a whole, appeals predominantly to the prurient interest of minors; (2) depicts, represents, or describes sexually oriented nudity or conduct in a patently offensive way, with respect to what is suitable for minors; and (3) taken as a whole, lacks serious literary, artistic, political or scientific value for minors. Conf. Rep. at 189; 142 Cong. Rec. H1145, H1165-66 (daily ed. Feb. 1, 1996) (statement of Rep. Berman); Center for Democracy and Technology, *CDT Policy Post Number 31* (Dec. 4, 1995) <http://www.cdt.org/publications/pp311204.html>.

[30] *ACLU v. Reno*, 929 F. Supp. at 854-55 (Sloviter, C.J.); *see also Shea v. Reno*, 930 F. Supp. 916, 949-50 (S.D.N.Y. 1996), *appeal pending*, No. 96-595.

seamless national, and indeed international, nature of interactive computer communications makes it far from certain which "contemporary community standards" are pertinent (and whether they are ascertainable). Facing such ambiguity, a prudent speaker or information host would attempt to limit speech to that acceptable in the most restrictive community in the nation (to the extent that such acceptability could be determined), thereby severely chilling discourse. Accordingly, the "contemporary community standards" requirement exacerbates the problems arising from the uncertainty and breadth of the criminal prohibition.

The CDA's vague and overbroad standards of liability also impinge on constitutionally protected messages or communications directed to minors such as 16-year olds and 17-year olds. For example, numerous online magazines and Websites are directed to teen readers, and frank discussion of issues such as teen pregnancy or sexually transmitted diseases might be deemed "indecent" or "patently offensive." The CDA's criminal prohibition of such speech thus is unconstitutional, not only on the basis of its effect on adult speech, but on the basis of its restriction of speech to certain minors as well.[31]

In sum, the CDA enacts an extremely broad and nebulous standard, threatening a wide range of business communications on interactive computer services. It is especially troubling that the CDA wields the club of criminal sanctions for such communications. The immediate effects of the CDA would be to unjustifiably inhibit communications on interactive computer services for

[31] *Cf. ACLU v. Reno*, 929 F. Supp. at 855 n.1 (Sloviter, C.J.) (observing that the CDA "probably covers speech protected by the First Amendment for some minors as well, because it fails to limit its reach to that which is harmful for minors," but concluding that the issue "is not necessary to decide in light of the other conclusions reached"); *see also, e.g., Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-14 (1975).

many businesses and to severely distort the use and development of this vital communications medium. The precedential effect of this form of criminal liability likewise would be especially grave. The CDA thus would have an unwarranted and harmful direct and precedential effect on American businesses who use and depend on information technology products and services, especially interactive computer services.

C. The Statutory Defenses Are Not Feasible Technologically Or Economically, Or Are Simply Inapplicable To Business Communications.

The CDA provides certain specified "defenses" to prosecution. 47 U.S.C. § 223(e). These defenses are inadequate to rescue the statute from constitutional infirmity and to provide the certainty required by the business community and other users.

The government has particularly emphasized two defenses. First, the CDA provides a defense if an actor has taken "good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in [the liability sections], . . . including any method which is feasible under available technology." 47 U.S.C. § 223 (e)(5)(A). Second, the CDA provides a defense if an actor "has restricted access to such communication by requiring the use of a verified credit card, debit account, adult access code, or adult personal identification number." 47 U.S.C. § 223(e)(5)(B). These defenses cannot salvage the statute. At the outset, it must be recognized that these "defenses" are, in fact, exactly that—defenses to possible criminal prosecutions. The mere threat or possibility of criminal prosecution, however, will cause most law-abiding citizens, including American businesses, to attempt to steer far clear of possibly offending actions. "Criminal prosecution, which carries with it the risk of public obloquy as well as the expense of court preparation and attorneys' fees, could itself cause incalculable harm. No provider, whether an individual, nonprofit corporation, or even large, publicly held corporation, is likely to willingly subject itself to prosecution for a miscalculation of the prevalent community standards or for an error in judgment as to what is indecent. A successful defense to a criminal prosecution would be small solace indeed." *ACLU v. Reno*, 929 F. Supp. at 856 (Sloviter, C.J.).

Furthermore, even on their own terms, the defenses are inadequate. The CDA requires "good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors." 47 U.S.C. § 223 (e)(5)(A). The district court specifically found as a fact, however, that "[t]here is no effective way to determine the identity or the age of a user who is accessing material through e-mail, mail exploders, newsgroups or chatrooms." *ACLU v. Reno*, 929 F. Supp. at 845, Finding of Fact ¶ 90. The same is true of Websites available through large commercial online services. *Id.*, Finding of Fact ¶ 96. Thus the "effective" actions provision is not a meaningful defense; it is a mirage.[32]

Moreover, the requirement of "effective" and "appropriate actions under the circumstances . . . including any method which is feasible under available technology" is, at best, ambiguous and unclear. The statute does not specify what available technologies, if any, would satisfy these criteria. Tellingly, the government was unwilling or unable at trial to stipulate that *any* potential method of compliance would qualify for the defense. *ACLU v. Reno*, 929 F. Supp. at 856 (Sloviter, C.J.). Facing criminal liability punishable by two years in prison and a substantial fine, reasonably prudent citizens, including businesses, would feel compelled to attempt to employ all

[32] Even in the limited circumstances in which attempted age verification might be technically feasible, such efforts would be extremely burdensome and would have little prospect of effectiveness. *See ACLU v. Reno*, 929 F. Supp. at 854 (Sloviter, C.J.).

available measures to restrict or prevent access by minors, in order to maximize their likelihood of successfully availing themselves of this defense. Such measures could include the most advanced available technologies in a constantly changing medium. As such, the defense would amount to a burdensome technological mandate, representing a crushing and continuing obligation for businesses. The rapid pace of technological development would likely require frequent purchases of new technology, installation of this technology, and training of employees. Such a requirement would impose an overwhelming financial responsibility on large and small businesses alike.

Similarly, the "verified credit card" or "adult access code" defense also is inadequate. First, numerous communications of commercial interest, even by and to businesses, do not involve commercial transactions. For example, discussions of products and services and advertisements do not involve a fee of any kind, and likewise would not be subject to the "verified credit card" defense. *ACLU v. Reno,* 929 F. Supp. at 846, 847, Finding of Fact ¶¶ 98, 106. Furthermore, electronic messages generally are not, and cannot practically be, disseminated by use of verified credit cards. Adopting a verified credit card or "adult access code" system for such non-fee communications would be prohibitively expensive for most businesses;[33] it would also change the nature of the communication and decrease access to the speech and information at issue.[34] It might not even be feasible.[35]

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[33] *See, e.g.*, 929 F. Supp. at 846, Finding of Fact ¶ 99 (credit card verification costs the provider $1 for each transaction).

[34] *See ACLU v. Reno*, 929 F. Supp. at 847, Finding of Fact ¶ 106 ("evidence suggest[s] that adult users, particularly casual Web browsers, would be discouraged from retrieving information that required use of a credit card or password"); *id.* at 846, Finding of Fact ¶ 101 ("[c]redit card verification would significantly delay the retrieval of information on the Internet," which would inhibit use and stifle access).

[35] *See ACLU v. Reno*, 929 F. Supp. at 846, Finding of Fact ¶ 98 ("The Government's expert 'suspect[ed]' that verification agencies would decline to process a card unless it accompanied a commercial transaction. There was no evidence to the contrary.").

Second, even if far more extensive reliance on "verified credit card" uses were feasible, the effect would be to deny many adults access to constitutionally protected speech. "Imposition of a credit card requirement would completely bar adults who do not have a credit card and lack the resources to obtain one from accessing any blocked material." *ACLU v. Reno,* 929 F. Supp. at 846, Finding of Fact ¶ 102. Unlike other contexts in which "verified credit card" requirements might be considered, moreover, adults denied access to significant information on the Internet by a credit card requirement would be obstructed from participating in this "unique and wholly new medium of worldwide human communication." *Id.* at 844, Finding of Fact ¶ 81.[36]

Accordingly, the defenses relied on by the government are inadequate to salvage the statute. They are neither economically nor technologically feasible in many circumstances. Even more fundamentally, the "defenses" cannot provide the missing clarity or narrowness about what the statute itself proscribes. The defenses cannot provide the standard that would give business users of interactive computer networks an appropriate understanding of the circumstances in which deployment of specified

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[36] For reasons similar to those involving verified credit cards, other adult verification requirements also generally are not practicable or economical. *See ACLU v. Reno*, 929 F. Supp. at 854 (Sloviter, C.J.) ("non-commercial organizations and even many commercial organizations using the Web would find it prohibitively expensive and burdensome to engage in the methods of age verification proposed by the government, and . . . even if they could attempt to age verify, there is little assurance that they could successfully filter out minors."); *see also id.* at 846-48, Finding of Fact ¶¶ 97-116.

"defenses," even if they were otherwise economically and technologically feasible, would be necessary or relevant.[37]

The distinguishing characteristics of the Internet and other interactive computer services are their openness, universality, and accessibility. Taken together, the standards and defenses of the CDA are fundamentally antithetical to these qualities. The Act would leave businesses with a stark and unpalatable choice: substantially increased silence and self-censorship or aggressive efforts to drastically limit the potential audience of any communication. The former option would muzzle valuable communications and harm competitiveness. The latter option would attempt to transform the vast, accessible Internet to an outmoded single-line, point-to-point conception of telecommunications with an identified speaker and identified listener; it would threaten the very nature of the Internet and interactive computer services, and imperil their role as a free and open participatory marketplace of expression.

[37] The "employer/employee" defense provided in section 223(e)(4) (47 U.S.C. § 223(e)(4)) provides some insulation from liability for the actions of rogue employees, but it falls far short of providing a complete defense or resolving the statutory problems for businesses, particularly in view of the excessive breadth and vagueness of the criminal standard.

CONCLUSION

Protecting children is a laudable and important objective. Unfortunately, however, the Communications Decency Act fails to achieve that objective in a constitutionally permissible manner. The effect of the statute would be to endanger a broad range of permissible and desirable speech, and to inhibit the development of a dynamic, rapidly evolving communications medium.

The judgment of the district court should be affirmed.

Respectfully submitted,

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February 20, 1997

Supreme Court, U.S.
FILED
FEB 20 1997
CLERK

No. 96-511

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,

Appellants,

v.

AMERICAN CIVIL LIBERTIES UNION, *et al.*,

Appellees.

On Appeal From The United States District Court For The Eastern District of Pennsylvania

BRIEF OF FEMINISTS FOR FREE EXPRESSION AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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INTEREST OF THE AMICUS CURIAE[1]

Feminists for Free Expression ("FFE") is a national organization of women and men who share a commitment to both gender equality and freedom of expression. FFE was founded on the tenet that the right of free speech is a prerequisite to attaining gender equality and cannot be disregarded for fashionable causes without inevitably harming women's rights. FFE is thus dedicated to opposing censorship that, however well-intended, is ultimately counterproductive to the goal of equality for women.

As many of FFE's writer and artist members can attest, feminist expression is inherently controversial and often blamed for social problems ranging from divorce to teenage pregnancy, just as some erotic speech is made the scapegoat for other social ills. Indeed, any written or visual work that deals frankly with women's lives and sexuality is at risk of censorship.[2] In recent years, many feminist artists and writers have learned from first-hand experience that the urge to censor "offensive" material is prevalent in our society,[3] and feminist work is particularly

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[1] Counsel for appellants and appellees have consented to the filing of this brief *amicus curiae*. Their consent letters are on file with the Clerk of the Court.

[2] Works that have been officially or unofficially censored over the past few years include *The Diary of Anne Frank*, Maya Angelou's *I Know Why the Caged Bird Sings*, Margaret Atwood's *The Handmaid's Tale*, Judy Blume's *Are You There, God? It's Me, Margaret*, Nancy Garden's *Annie on My Mind*, Leslea Newman's *Heather Has Two Mommies*, and Alice Walker's *The Color Purple*. *See The Most Frequently Banned Books in the 1990s* (visited Feb. 13, 1997) http://www.cs.cmu.edu/People/spok/most-banned.html; Herbert Foerstel, *Banned in the USA*, ch. 4 (1994); Marcia Pally, *Sense and Censorship: The Vanity of Bonfires* at 5-6 (Americans for Constitutional Freedom 1991).

[3] *See* Foerstel, *Banned in the U.S.A.* at xiii; Pally, *Sense and Censorship: The Vanity of Bonfires*; Margaret Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society — From Anthony Comstock to 2 Live Crew*, 33 Wm. & Mary L. Rev. 741 (1992).

vulnerable to such censorship.[4]

Because the freedom to put forth controversial feminist ideas and to combat ignorance regarding sexuality, reproduction, and abuse is critical to women's rights and well-being, FFE believes that it is particularly incumbent upon women to oppose censorship in all forms. Few forms of censorship, however, are as threatening to women's interests as the Communications Decency Act's restrictions on "indecent" and "offensive" speech on the Internet. The Internet offers unprecedented opportunities for individuals to exchange information and debate ideas, making it the front line in free speech. Indeed, it is the first forum in the "marketplace of ideas" that is so accessible to all as to make Justice Brandeis' answer to false speech — *more* speech[5] — truly work. Ignorance is countered by information, controversies are debated on their merits, and the truth wins out — so long as it is not censored.

FFE views the Internet as key to achieving gender equality, a goal that will be greatly harmed by the Congress's attempted restrictions on Internet communications. FFE therefore has a strong interest in ensuring that the Internet remains free from censorship that is inconsistent with the fundamental free-speech rights that are so crucial to women.

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[4] Karen Finley and Holly Hughes, for example, are feminist playwrights and actresses whose NEA grants were improperly denied on "decency" grounds. *Finley v. National Endowment for the Arts*, 795 F. Supp. 1457 (C.D. Cal. 1992), *aff'd*, 100 F.3d 671 (9th Cir. 1996). Judy Blume's books for adolescents have won wide acclaim, but have also spawned such controversy that the American Library Association calls her "the most censored author in America." Erica Jong's frank treatment of women's sexuality in her best-selling novels has likewise drawn fire, as has Barbara Alper's photography and Ana Ferrer's sculpture.

[5] *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there [is] time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence").

SUMMARY OF ARGUMENT

The Communications Decency Act of 1996 ("CDA") makes it a crime to use computer communications to transmit or display "indecent" or "patently offensive" content in a manner available to minors. 47 U.S.C. § 223(a)(1), (d)(1).[6] Such communications, however, are protected by the First Amendment, so long as they are not obscene. They therefore cannot be prohibited, even to serve compelling interests, except "by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (striking down ban on indecent telephone communications because "it is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends").

The CDA is not carefully tailored or narrowly drawn. Since there is no effective way for most Internet speakers to prevent their speech from reaching minors, *ACLU v. Reno*, 929 F. Supp. 824, 845 (E.D. Penn. 1996); *Shea v. Reno*, 930 F. Supp. 916, 927-28 (S.D.N.Y. 1996), the only way for them to avoid criminal sanctions is to refrain entirely from speech that could be considered "indecent" or "offensive." The CDA would thus effectively ban some speech altogether, since the Internet is often the only forum available to ordinary citizens. As the court below recognized, much of the material potentially subject to the CDA's criminal sanctions has serious literary, artistic, political, or scientific value. Online discussions of AIDS prevention, survivors' stories of incest and rape, photography and art exhibits, and news stories on human-rights violations or sexual harassment are all important to women, yet all contain material that could be considered "indecent" or "patently offensive" even in "context."

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[6] FFE, like the appellees, will cite to the U.S. Code sections where the CDA will be codified, rather than to the Telecommunications Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 56, 133-35.

The CDA's broad sweep would actually thwart, rather than serve, the government's asserted interest in furthering the ability of parents and children to take advantage of the Internet's educational opportunities. The CDA would reach a great deal of online information — such as safe-sex instruction or photography exhibits or news articles — that some parents might choose to use with their older children. Instead of allowing parents to make that choice by supervising and screening their children's use of online resources, the CDA would dictate one result for all parents and for all children.

ARGUMENT

I. The CDA would effectively ban valuable speech among adults on a wide array of topics, ranging from sexual harassment to AIDS prevention.

The CDA prohibits "patently offensive" speech in terms so vague and overbroad that even the government and the *amici* supporting it are unable to agree on its scope. The statute makes it a crime to use the Internet to display, in a manner available to minors,

> any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.

47 U.S.C. § 223(d)(1).[7] Some *amici* contend that this language proscribes only "pornography." Brief of *Amici Curiae* Members of Congress, at 8. Another acknowledges approvingly that it reaches material that has serious value and nonprurient purpose as well. Brief of *Amicus Curiae* Morality in Media, at 9. The

[7] Section 223(d) also prohibits using the Internet to send such material to specific minors, while Section 223(a) prohibits transmitting "obscene or indecent" material to minors. The court below assumed that "indecent" material was the same as Section 223(d)'s "patently offensive" material. *ACLU*, 929 F. Supp. at 850 (Sloviter, C.J.).

government itself takes a third tack, suggesting that serious work would "almost always" fall outside the CDA, and thus that sometimes it would not. Brief for Appellants, at 17, 44; *see* Brief of *Amicus Curiae* The Family Life Project, at 22. If even the CDA's supporters cannot agree on what this language encompasses, how can prosecutors, judges, and juries avoid arbitrary enforcement of this criminal statute? More importantly, how can ordinary citizens avoid prosecution — except, of course, by not speaking?

The CDA would thus chill, if not ban outright, speech that has serious value and nonprurient purpose. As we show below, online discussions of sexual harassment, debates over laws prohibiting pornography, poetry by incest survivors, instruction for AIDS prevention, and even some news stories all contain material about sexual activity that, in context, could be considered patently offensive in some communities. Such speech would arguably fall within the CDA's definition, thus making it a crime to transmit or display it online in a manner available to minors.

The vast majority of Internet speakers have no practical way of preventing minors from accessing their online communications. *ACLU*, 929 F. Supp. at 845; *Shea*, 930 F. Supp. at 927-28. Thus, they can avoid criminal sanctions only by refraining from any "indecent" or "offensive" speech, regardless of its serious value or importance. This Court, however, has long held that the government may not "reduce the adult population . . . to . . . only what is fit for children," even to protect children from indecent speech. *Butler v. Michigan*, 352 U.S. 380, 383 (1957); *accord Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2393 (1996); *Sable Communications*, 492 U.S. at 128; *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 73 (1983). Because the CDA would effectively preclude adults from engaging in speech with serious value, it unconstitutionally infringes the First Amendment rights of Internet users.

A. The CDA effectively bans protected speech among adults.

There is one point on which the parties and the *amici* agree: the Internet is a unique, and uniquely valuable, medium, which opens vast new opportunities for communication to all Americans. This is not a reason, as the government suggests, to impose content-based criminal prohibitions on "indecent" or "offensive" speech in this medium. It is instead a reason why this Court should be particularly reluctant to authorize such interference with "uninhibited, robust, and wide open" speech on the Internet. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Many speakers and listeners would have no practicable way to reach one another without the Internet, where many of them engage in otherwise protected speech that could come within the reach of the CDA. Contrary to the government's suggestion (Brief of Appellant at 28), women seeking to engage in such speech cannot simply go to a nightclub or buy a magazine to find an alternative to participating in frank, open discussions of sexuality or discovering that they are not alone in overcoming the trauma of rape or coming to terms with childhood incest.

Indeed, many Internet users live in small, isolated communities where they simply have no other viable means of gaining access to the kind of valuable but sexually explicit information available on the Internet. Other users would not speak without the anonymity provided by the Internet: victims of incest or rape, for example, or women exploring their sexual orientation, or even women with "embarrassing" questions about sex or reproductive health might not speak at all in forums where their identity was known. *See ACLU*, 929 F. Supp. at 849, ¶ 121 (finding that "[a]nonymity is important to Internet users who seek to access sensitive information").

Finally, there are no alternatives to the Internet's "genderless" environment. Because women may speak online without revealing their gender, they may feel more free to speak candidly and openly about political, cultural, or moral issues involving sex and sexuality without facing social opprobrium. Indeed, a woman

using the Internet may find her speech being taken seriously for the first time — precisely because the audience does not know her gender, and thus does not automatically discount what she says.

For many women, then, the Internet provides a unique opportunity for speech. Without the Internet, these women would have no way to engage in frank discussions of sexual matters and no way to communicate with those who can answer their "embarrassing" questions, who understand their feelings about their sexuality, or who can help them deal with the aftermath of rape or incest. A ban on "indecent" and "offensive" online communications would thus effectively ban such speech altogether.[8]

B. The CDA sweeps so broadly that it could criminalize speech with serious value, reaching discussions as diverse as politics, sexual narassment, AIDS prevention, and child abuse.

The Internet is the first forum where ordinary women can speak to national, or even global, audiences to debate the important issues of the day. Discussions of topics important to women, however, will be chilled, if not banned outright, by the CDA's criminal sanctions for "patently offensive" speech. On its face, at least, the CDA appears to ban all "indecent" or "patently offensive" speech, including that with serious value. *See ACLU*, 929 F. Supp. at 855 (Sloviter, C.J.) (Congress did not exclude material with serious value from the CDA.); *id.* at 863 (Buckwalter, J.) (The CDA's prohibitions must reach works of serious value, as "indecency has *not* been defined to exclude

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[8] FFE does not in any way suggest that the constitutionality of the CDA turns on the existence or non-existence of alternative forums for indecent speech. Even if there were adequate alternatives to the Internet, this would not save the CDA, as a content-based criminal law suppressing speech. The uniqueness of the Internet and the lack of alternatives for many who use it simply underscore the magnitude of the CDA's censorial effect.

[them]."). In any event, because of the inherent uncertainty of the scope of what is banned, many Internet users will be silent rather than risk prosecution, and communications will be chilled.

The following examples are just a few of the many online communications about sexually explicitly topics that could be considered by some prosecutors, judges, or juries to be "indecent" or "patently offensive" even though they have serious value or nonprurient purposes. As the examples make clear, much of this speech is of vital importance to women and even to older teenage girls.

1. *The CDA could prohibit speech that saves lives.*

The district court found that groups such as appellee Critical Path maintain web sites that display explicit safe-sex instructions, written in street language to reach a young audience. *ACLU*, 929 F. Supp. at 844. Indeed, there are several hundred thousand discussion groups and postings on the Internet regarding safe sex, many of which include explicit descriptions of sexual activities designed to prevent the spread of AIDS and other sexually transmitted diseases.[9] They often use vulgar street language "to

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[9] A search for the words "safe sex" turned up 500,000 postings on the Web, using the Netscape Navigator and the AltaVista search engine. *See, e.g.*, Critical Path AIDS Project, Inc., *Critical Path AIDS Project* (visited Feb. 12, 1997) http://www.critpath.org; *The Safer Sex Page* (visited Feb. 12, 1997) http://www.safersex.org (including a forum for questions and discussions); *A Girl's Guide to Condoms* (visited Feb. 13, 1997) gopher://eng.hss.cmu.edu/00ftp%3aEnglish.Seven%3aFeminism%3aGirl%27s%20Guideto%20Condums; The Coalition for Positive Sexuality, *Just Say Yes* (visited Feb. 12, 1997) http://www.positive.org/cps/jsy/jsy.html; Planned Parenthood Federation of America, *Sex — Safer and Satisfying* (visited Feb. 12, 1997) http://www.ppfa.org/ppfa/safesex1.html; The Society for Human Sexuality, *Hot Sex, Safely: A Guide to Safer Sex Techniques* (visited Feb. 13, 1997) http://weber.u.washington.edu/%7Esfpse/safesex.html. A number of these sites have links to discussion areas. *See, e.g.*, Critical Path AIDS Project, Inc., *Critical Path AIDS Project* (visited Feb. 12, 1997) http://www.critpath.org; *The Safer Sex Page* (visited Feb. 12, 1997) http://www.safersex.org.

attract a teen audience and deliver their message in an engaging and coherent way." *ACLU*, 929 F. Supp. at 871 (Dalzell, J.).

These safe-sex materials are vitally important to women. And, as Chief Judge Sloviter noted, they could be "critically important for certain older minors, [as] one quarter of all new HIV infections in the United States is estimated to occur in young people between the ages of 13 and 20." *ACLU*, 929 F. Supp. at 853 (Sloviter, C.J.). Access to these materials could save lives. That access, however, could be denied under the CDA, for, as the district court found, these materials could be considered patently offensive in many communities, even in context. *Id.*

The CDA could also reach other essential health information on the Internet, such as illustrated instructions on how to perform a breast-cancer self-examination or educational materials on other sexually transmitted diseases. There are thousands of sites discussing breast cancer, for instance.[10] Once again, these materials could save lives, and once again, many of them are explicit enough that, even in context, they could be considered patently offensive in some communities.

2. *The CDA could make it a crime for victims to discuss their experiences and seek help online.*

There are numerous mailing lists, newsgroups, chat rooms, and

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[10] *See, e.g.*, American Cancer Society, *Breast Self-Examination* (visited Feb. 12, 1997) http://www.ca.cancer.org/services/breast/bse.html (illustrated instructions for self-exams); Memorial Sloane-Kettering Cancer Center, *The Breast Examination Center of Harlem* (visited Feb. 12, 1997) http://www.mskcc.org/document/pedbse.htm (same); Medical Interactive Applications, Inc., *Breast Self-examinations* (visited Feb. 12, 1997) http://www.immediate.com/media/breast.html (same); Planned Parenthood Federation of America., *Breast Cancer Awareness* (visited Feb. 12, 1997) http://www.ppfa.org/ppfa/breast_cancer_bse.html (same).

web sites dedicated to helping victims of rape, incest, and sexual assault come to terms with that experience by giving them the opportunity to tell their stories and learn that they are not alone.[11] Sometimes, of course, a victim may be unable to convey her outrage and her injury without graphic words and descriptions. Such descriptions, however, could be considered patently offensive by some people even in context. *See, e.g.*, *Pacific & Southern Co., Notice of Apparent Liability*, 6 F.C.C.R. 3689 (1990) (finding broadcast of rape victim's graphic story indecent). Even the victim's use of expletives to express her anger could fall within the CDA. *ACLU*, 929 F. Supp. at 872 (Dalzell, J.) (noting that one government expert testified that he would be offended by the use of expletives); *id.* at 864 (Buckwalter, J.) (noting that government's expert opined that the CDA would reach any use of the "seven dirty words").

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[11] *See, e.g.*, Veritas Programming, *The Truth in Any Memory* (visited Feb. 12, 1997) http://www.sover.net/~schwcof/memory2.html (inviting survivors to post their stories because "[r]eading the stories of fellow survivors . . . can bring a measure of relief"); Carleen E. Ellis, *Butterflies: The Magazine for Survivors of Incest, Sexual Abuse, and Ritual Abuse Who Have Reclaimed Their Lives* (visited Feb. 12, 1997) http://drwnet.com/bfly (including discussion-group mailing list "for those who need to know they're not alone"); TimePassages, *Voices of Kind Discussion Forum* (visited Feb. 12, 1997) http://www.timepassages.com/VOK/0VOK.htm (for victims of incest); *The Survivor's Page* (visited Feb. 12, 1997) http://www.stardate.bc.ca/survivors (posting letters, poetry, and writings of victims of sexual abuse and rape); *Survivors on the Net* (visited Feb. 12, 1997) http://www.mistral.co.uk/survivors/survive.htm (writings by survivors); Anne M. Cox, *Write to Tell* (visited Feb. 12, 1997) http://www.geocities.com/CapitolHill/3581/tell.html (providing a creative outlet for sexual abuse survivors to exchange thoughts and writings); Rape, Abuse, and Incest National Network (visited Feb. 12, 1997) http://www.feminist.com/rainn.html; ASAR(C) (visited Feb. 12, 1997) http://wchat.on.ca/public/asarc/index.html (providing chatline for victims of sexual abuse and assault); Stop The Violence, *Stop Violence Against Women* (visited Feb. 12, 1997) http://www.zoom.com/personal/staci/violence.htm (incest and child abuse survivors' resource).

Even if such discussions were not criminally prosecuted, the CDA would chill them. Women using chat rooms, email, and bulletin boards who are unfamiliar with the legal contours of "indecency" may well be silent rather than risk prosecution; after all, it is difficult enough to talk of these experiences without worrying about being too explicit. *ACLU*, 929 F. Supp. at 872 (Dalzell, J.) (noting that participants in online discussions of rape "could legitimately fear prosecution" under the CDA). Women cannot be expected, and constitutionally cannot be required, to sanitize their speech about such personally traumatic events.

3. *The CDA could prohibit literary and artistic expression.*

Many writers, poets, photographers, and artists display their work on the Internet; other artists' work may be displayed through online magazines, museum guides, or libraries. *See ACLU*, 929 F. Supp. at 842-43, ¶¶ 74-75; *id.* at 853 (Sloviter, C.J.); *id.* at 844, ¶ 85 (finding that images of Edward Weston's and Robert Mapplethorpe's nude photography were available through UCR/California Museum of Photography's web site).[12] As evidenced by the continuing censorship of books or plays exploring women's sexuality, and by the protests over photography or museum exhibits, some of this work may be considered "patently offensive" in certain communities, even while others laud it with praise and awards.[13] *See, e.g.*, *ACLU*,

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[12] The photographs at issue are posted at *Weston-Mapplethorpe Exhibition* (visited Feb. 12, 1997) http://cmpl.ucr.edu/Exhibitions/w_m/wm2.html.

[13] The following examples of original work posted on the Internet could all be considered patently offensive in some communities. Danny Conant, *Danny Conant Photography* (visited Feb. 12, 1997) http://www.art.net/Studios/Visual/Danny/dscartnet.html (exhibiting original photography, including nudes); Andrea Dworkin, *Intercourse* (visited Feb. 12, 1997) http://www.igc.org/Womensnet/dworkin/Intercoursel.htm (excerpt from book); Carleen E. Ellis, *Butterflies: Thoughts on Being an Incest Survivor* (visited Feb. 12, 1997) http://www.drwnet.com/bfly/bflysurv.html (posting excerpt from her book *Pieces of Me*); The Mark Lynch Gallery (visited Feb. 12, 1997) http://www.io.com/~

929 F. Supp. at 853 (Sloviter, C.J.) (suggesting that the award-winning play *Angels in America* may be considered patently offensive in some communities). The CDA could make it a crime to display such materials on the Internet, thus chilling the online publication of literary and artistic work.

4. *The CDA could even reach discussions of news and politics.*

Numerous news stories and political discussions important to women involve sexually explicit speech that could be considered patently offensive by some. Online articles and discussions of female genital mutilation, which recently made headlines when it was reported that immigrants were continuing the practice here in the United States, are, as Chief Judge Sloviter recognized, graphic enough that they could be considered patently offensive even in context. *ACLU*, 929 F. Supp. at 853 (Sloviter, C.J.).[14] Reports of human-rights violations, including forced prostitution,

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photoguy/history.html (exhibiting original photography, including male nudes); Mary Anne Mohanraj, *Mary Anne's Home Page* (visited Feb. 12, 1997) http://www.iam.com/maryanne/home.html (posting original fiction, poetry, and erotica); R.J. O'Connor, *rj o'connor's Studio* (visited Feb. 12, 1997) http://www.art.net/Studios/Visual/Rjocon/rjocon.html (posting original drawings, paintings, and photography, including nudes); *Sarabel's Studio* (visited Feb. 12, 1997) http://www.art.net/Studios/Visual/Sarabel/sarabel.html (exhibiting, *inter alia*, Rembrandt's *Andromeda*); Suzanne Stutman, *Broken Feather: A Journey to Healing* (visited Feb. 13, 1997) http:/ /www.bookmasters.com/marktplc/readroom/rr00158.htm#PainTwo (posting poems and excerpts from her book on surviving sexual abuse).

[14] *See, e.g.*, Fran Hosken, *Female Genital Mutilation* (visited Feb. 12, 1997) http://www.feminist.com/fgm.htm; Marcia L. Mason, *Atrocities Against Women: Female Genital Mutilation* (visited Feb. 19, 1997) http://www.worldcitizen.org/issues/junjul96/fgm.html.

rape, and sexual mutilation, can be just as graphic.[15] This information is vital to those concerned with women's rights, and human rights generally, but it could be banned by the CDA.

Online discussions of the First Amendment freedoms so crucial to women would also be at risk. For example, an academic discussion of the extent to which the government may constitutionally regulate pornography might describe pornographic material in graphic detail to illustrate the asserted harm.[16] Or a debate on censorship might include the material censored.[17] Indeed, some material is posted on the Internet precisely *because* it has been censored by certain communities. Plaintiff Justice on Campus, for example, maintains a web site and an online mailing list for discussing and posting material that has been censored, particularly by schools.[18] *Banned Books On-Line* provides the entire text of books that have been suppressed or censored for

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[15] *See Human Rights Watch* (visited Feb. 13, 1997) gopher://gopher.igc.apc.org:5000/11/int/hrw (posting reports on human-rights violations); *Violence Against Tibetan Women: Torture and Sexual Abuse of Women Activists and Those in Custody* (visited Feb. 12, 1997) http://www.grannyg.bc.ca/tibet/women4_3.htm (reports of torture and sexual abuse in Tibet).

[16] *See, e.g.*, Andrea Dworkin, *Letters From A War Zone* (visited Feb. 12, 1997) http://www.igc.apc.org/Womensnet/dworkin/WarZoneAListing.html; Andrea Dworkin,*The Root Cause*, Chapter 9 of *Our Blood: Prophecies and Discourses on Sexual Politics* (visited Feb. 12, 1997) http://www.igc.apc.org/Womensnet/dworkin/OurBloodIV.html.

[17] *See, e.g.*, Committee for Artists' Rights Archive, *Robert Mapplethorpe Traveling Exhibition* (visited Feb. 12, 1997) http://fileroom.aaup.uic.edu/FileRoom/documents/Cases/337mapplethorpe.html (discussing the arrest and indictment of Cincinnati's museum director for exhibiting Robert Mapplethorpe's critically acclaimed photography and displaying one of the photographs labeled "obscene").

[18] *The Justice On Campus Project* (visited Feb. 12, 1997) http://joc.mit.edu.

"indecency," such as *Candide*, *Ulysses*, and *Fanny Hill*.[19] Arguably, these and other censored works could not be displayed or discussed online without potentially running afoul of the CDA, since some communities have already judged them to be patently offensive.

Even the complaints in sexual harassment suits like *Clinton v. Jones* or court opinions in First Amendment cases like *New York v. P.J. Video*, 415 U.S. 868 (1986) could be prohibited under the CDA. The allegations in the Jones suit, for example, describe sexual activities and organs in terms that might be considered patently offensive in some communities,[20] while the opinion of this Court in *P.J. Video* includes an appendix with affidavits detailing the sex scenes in a movie seized for obscenity, 415 U.S. at 883-84. And news articles and commentary discussing the cases may well contain descriptions at least as graphic as the complaints and opinions themselves.[21]

In sum, the CDA would chill a substantial amount of online material that has serious literary, artistic, political, or scientific value. Much of this material is of great importance to women and to feminists, but much of it could be considered patently offensive, even in context, in some communities. Effectively banning all of this material from the Internet, in an attempt to shield children from "offensive" speech, is a classic case of unconstitutional overreaching.

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[19] *Banned Books On-Line* (visited Feb. 12, 1997) http://www.cs.cmu.edu/People/spok/banned-books.html.

[20] *See* Compl. ¶¶ 21-22, 24, *Jones v. Clinton*, No. LR-C-94-290 (visited Feb. 12, 1997), *available at, e.g.*, http://www-swiss.as.mit.edu/zoo/clinton-full-complaint.text.

[21] *See, e.g.*, Court TV Library, *Paula Jones' Case Against Clinton* (visited Feb. 12, 1997) http://www.courttv.com/library/government/jones/staylor.htm (posting Stuart Taylor's November, 1996, article from *The American Lawyer*).

II. The CDA's broad sweep would actually thwart, rather than serve, the government's newly asserted interest in furthering the ability of all Americans to take advantage of the Internet.

The government asserts that the CDA may be justified as "furthering the First Amendment interest of all Americans to use what has become an unparalleled educational resource." Brief for Appellant, at 14. But even if this interest is compelling, the government has not shown that the CDA would further it. In fact, it is far more likely that the CDA would severely hamper the First Amendment right of all Americans to engage in speech on the Internet.

Women have a particular interest in keeping the Internet's educational resources open to all users, for women depend on exchanging information and debating ideas in their quest for gender equality. Women also want, as parents, to use the Internet as an educational tool for their children. But different parents may make different choices as to how to raise and educate their children. One parent, for example, may encourage her child to read *Catcher in the Rye*, while another forbids it altogether; one parent may think that *Angels in America* is too adult for her child, while another may find it highly appropriate. It is up to the parent, not the government, to make these decisions. *See Meyer v. Nebraska*, 262 U.S. 390 (1923) (upholding liberty of parents to direct the upbringing and education of their children); *see also Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

A parent's decision to use the Internet as an educational tool for her child is no different than her decision to allow the child to use the public library. Both the library and the Internet contain wonderful educational materials for children; both also contain materials that some parents might find objectionable. It is the parent who should choose whether to use the library or the Internet at all, and the parent who should decide whether, and how, to limit her child's access to the materials there. The CDA, however, would take away a parent's choice to give her child

access to the full scope of educational material on the Internet.

This Court has upheld laws prohibiting the sale of sexually explicit magazines to children, but it has never held that parents cannot show such material to their children if they so choose. *Ginsberg v. New York*, 390 U.S. 629, 639 (1968). Indeed, the *Ginsberg* Court specifically noted that the law at issue there did not prohibit parents from buying the magazines for their children if they so desired. *Id.* The CDA would rob parents of such choice by effectively banning sexually explicit material from the Internet. Some parents, for example, might wish to teach their children about sexuality and safe sex by using the materials available online. Under the chill of the CDA, however, those materials might no longer be available. In any event, a parent might fear using the Internet to display such materials for her child even if they were available, for the CDA could be read to make it a crime for a parent to allow her child to view "indecent" or "offensive" materials online. *See, e.g.*, 47 U.S.C. §§ 223(a)(2), (d)(2). Far from furthering the rights of parents and children to receive information and acquire knowledge, the CDA would severely impair those rights.

The best way to further the right of all Americans to receive and acquire knowledge is to encourage, not restrain, the free exchange of ideas that is the hallmark of the Internet. This exchange is sometimes coarse, occasionally vulgar, and certainly rough around the edges, but that is what one would expect when every person has a voice that can be heard. *ACLU*, 929 F. Supp. at 882 (Dalzell, J.). If there are words, or information, or ideas that parents do not wish to expose their children to, they can supervise their children's access to the Internet or use screening software. *See id.* at 839-42 (describing screening software). Neither option restricts the free speech rights of others, and both are effective at shielding children. In fact, parents will have to use supervision or screening even under the CDA to prevent children from accessing materials posted by the 40% of Internet users who are outside the United States, since the CDA does not, of course, reach such users. Supervision and screening also allow parents the option of shielding their children from other material

that they might object to, including information about guns, drugs, violent rock lyrics, even "communist ideas" or alternative religions. *Id.* at 839-40, ¶¶ 55, 57. Both options give parents control over what speech their children hear without restricting what others say.

When less restrictive means such as these exist to protect children while furthering the rights of all Americans to receive and acquire knowledge, Congress is not free to impose more restrictive laws that infringe the First Amendment. The rights of American Internet users to speak freely should be affirmed, and the decision of how to raise a child should be left where this Court has said it belongs: with the individual parents.

CONCLUSION

The decision of the three-judge court below should be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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(22)

No. 96-511

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,
APPELLANTS,

V.

AMERICAN CIVIL LIBERTIES UNION, ET AL.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND THE STUDENT PRESS LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF THE APPELLEES

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STATEMENT OF INTEREST

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of working reporters and editors, dedicated to defending the First Amendment and freedom of information interests of the news media. The Reporters Committee has provided representation, legal guidance and research in virtually every major press freedoms case that has been litigated in the United States since 1970.

The Student Press Law Center is a national, not-for-profit, incorporated, legal research, information and advocacy organization formed for the purpose of educating high school and college journalists about the importance of the First Amendment and defending their free speech rights. The Center has submitted numerous *amicus curiae* briefs, including a brief before this Court in *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S.Ct. 2510 (1995).

This brief is submitted on written consent of the parties.

STATEMENT OF THE CASE

Amici adopt the Appellee's Statement of the Case.

SUMMARY OF THE ARGUMENT

Open and informed debate is critical to maintaining a sound democracy, and the press plays a significant role in facilitating social discourse. Mindful of the press' function in furthering the free flow of ideas, courts have granted the broadest First Amendment protections to the gathering and dissemination of news. In light of this long tradition of protecting the editorial integrity of the press, *amici* respectfully request that the Court take into consideration the detrimental

impact that the Communications Decency Act ("CDA") would have on every news organization in this country and the public that relies on those organizations.

News organizations of all types maintain Internet sites where online versions of their news stories are posted. Because the Internet most closely resembles the print medium, it too should receive the most exacting First Amendment protection. The *Pacifica* broadcast model of content regulation does not fit the unique technical characteristics of the Internet.

The Internet has revolutionized the investigating and reporting of news. Journalists utilize the Internet to gain access to information, to post stories and to communicate with readers. There are endless examples of newsworthy topics that arguably fall within the purview of the statute and that could subject journalists to criminal sanction for doing their jobs. As this Court has noted in other contexts, editors faced with such penalties will seek to avoid liability by excluding potentially controversial material from their websites. The inevitable result of the statute, even if it is never enforced against a news organization, will be to chill free speech on important public issues.

ARGUMENT

I. This Court should consider the adverse impact that the CDA would have on the gathering and dissemination of news.

Journalists have a particularly strong interest in the instant case that should inform this Court's analysis of the CDA. The CDA would have a detrimental impact on the processes of newsgathering, news dissemination and the exercise of editorial judgment, all of which are entitled to the most exacting First Amendment protection. *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) ("[w]ithout some protection for seeking out the news, freedom of the press could be eviscerated"); *New York Times v. United States*, 403 U.S. 713 (1971) (the Government is proscribed from enjoining publication of current news, except in the most extreme circumstances); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (right of reply statute violates a newspaper's First Amendment right to editorial freedom). Information is the stock in trade of journalists, and the CDA makes them vulnerable to criminal prosecution simply for doing their jobs.

A. The Internet has become an invaluable and irreplaceable resource to journalists.

No other field has been altered more drastically by the proliferation of computer assisted research tools, including the Internet, than journalism. David Noach, *Setting Parameters*, *Editor & Publisher*, February 8, 1997 (citing a 1995 study in which 68% of the journalists polled said they use the Internet for research). The Internet provides journalists with instantaneous access to vast quantities of information, and has enlarged

investigative and data-gathering possibilities.[1]

The Internet has also transformed the way news is disseminated. According to the *American Journalism Review*, as of February 11, 1997, 768 commercial newspapers publish online editions, and 50 newspapers start publishing online each week. AJR News Link, http://www.newslink.org/emcol.html. The College Press Network reported on February 12, 1997, that 171 college newspapers maintain websites. *See* http://www.cpnet.com/news/state.html.

News posted on the Internet can be updated hourly, and can reach a global audience numbering in the millions. In addition, editorial staff can communicate regularly and immediately with readers. Journalists increasingly rely on the Internet's speed and scope while investigating and researching stories. Accordingly, they have a substantial interest in the Internet's content remaining uncensored and unregulated.

B. Reporting stories of great social import sometimes requires the use of speech that could be considered "indecent" under the CDA.

In the instant case, the lower court cited numerous illustrations of non-obscene material likely to be available on the Internet but subject to the CDA's criminal provisions. For

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[1] For example, a *Kansas City Star* reporter investigating the Food and Drug Administration's handling of a warehouse fire that released toxic substances resulting in the contamination of food stored in the warehouse used the Internet's Fedworld gateway to pull up the FDA's electronic bulletin board. The reporter noticed that the agency awarded additional contracts to the same companies that had botched disposal of the contaminated food. Steve Weinberg, *The Reporter's Handbook* (1996).

example, a human rights group might post information about female circumcision rituals performed in other countries, and advocacy groups might provide information about transmitting the HIV-virus and safe sex techniques. *ACLU v. Reno*, 929 F. Supp. 824, 853 (E.D. Pa. 1996).

The lower court further observed that artistic works may potentially violate the CDA. For example, the work of controversial photographer Robert Mapplethorpe "would be patently offensive in some communities," *Reno*, 929 F. Supp. at 853 (photographs showing sexual organs), as demonstrated by the April 1990 indictment on obscenity charges of the Contemporary Arts Center in Cincinnati and its director for exhibiting Mapplethorpe's work. It is not alarmist to assert that a news organization covering the story could be subject to prosecution under the CDA.[2]

Despite the fact that these sources may contain information that is "indecent" or "patently offensive" to minors, they clearly are of significant public concern. In order for journalists to keep the public informed about important political, social and cultural matters, they need to be able to gain access to these websites and download the posted information. Journalists should not be impeded in their efforts to seek out information that assists them in discussing these matters intelligently.

Following are examples of websites where information

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[2] In August 1990, the American Family Association filed a complaint with the FCC when WGBH-TV in Boston broadcast photographs from the Cincinnati exhibit on its "Ten O'Clock News" program to illustrate the debate about the artistic merit of Mapplethorpe's work. The FCC ultimately concluded that it lacked jurisdiction because WGBH aired the photographs after 10 p.m. 1991 Warren Publishing Inc., *Communications Daily*, April 29, 1991 at 5.

useful to journalists is posted that contains language that could arguably violate the statute.

(1) http://www.militarywoman.org — women in the armed services providing explicit descriptions of their experiences of being sexually harassed while on duty.
(2) http://www.uspto.gov — interestingly enough, a Government-maintained website. This is the Patent Office's website which includes posting of medical devices involving reproductive and excretory activities.
(3) http://www.amnestyint.com — a report on the genital torture and killing of a man by the Serbian police.

Enforcement of the CDA would burden the ability of journalists to cover these important issues.

C. The press routinely covers subjects that arguably fall within the purview of the CDA.

As discussed *supra* at 3, every type of media organization in this country, from broadcast networks to student newspapers, maintains websites where online versions of its material is posted. It is assumed that minors explore these websites.

A review of these websites reveals the existence of numerous articles covering a wide range of newsworthy and socially useful topics containing language that arguably violates the statute.

For example, appearing on *The New York Times* web page on February 7, 1997, was an article by a man who was a recently released hostage from the residence of the Japanese ambassador in Lima, Peru. In describing his experience, the man states that the hostages were reduced to urinating in soda bottles and defecating into plastic bags. *See* http://www.nytimes.com/web/docsroot/library/world/1229peru-

diaryreview.html.

The recently released audiotapes of a 1973 conversation between President Nixon and his chief of staff, H.R. Haldeman, provide another example of a newsworthy story containing explicit language. Media organizations posted stories on their websites reflecting the profane language Nixon used while discussing contributors to the Democratic Party and developments in the Watergate investigation. *See* the January 2, 1997 website of the Public Broadcasting Service's *News Hour*, http://www.pbs.org/newshour/bb/white_house/january97/nixon_1-2a.html; *see also* the websites for the *Fort Worth Star Telegram*, http://www.fwst.com:80/news/doc/1047/1:NATION J112596.html; the *Salt Lake Tribune*, http://www.sltrib.com:80/96/NOV/28/twr/01590120.htm; and *The Washington Post*, http:// www.washingtonpost.com:80/wp-srv/national/longterm/nixon/trans.htm.

In another example, *The San Francisco Examiner* posted on its website transcripts of a telephone conversation between then-Representative Mel Reynolds and a former underage campaign worker with whom Reynolds was having a sexual relationship. As a result of the relationship, Reynolds was convicted of obstruction of justice and having sex with a minor, and sentenced to five years in prison. During the conversation, Reynolds used graphic language for sexual intercourse, penis, and discussed masturbation, all of which is arguably "indecent." http://www.sfgate.com./examiner/bondage/BOND-23936.html.

The public has a legitimate interest in knowing about the conduct of its elected officials. Perhaps more importantly, the availability of the transcript provides the public with the opportunity to independently evaluate the Government's prosecution of Reynolds, the evidence presented against Reynolds, and the finding of Reynolds' guilt. Exposure to the system serves to educate the public and reinforce its faith in public institutions.

Following are other examples of newspaper websites that contain language that arguably violates the statute.

(1) http://www.newyorktimes.com/bosnia/indext.html Bosnia — a graphic photographic essay about the victims of ethnic violence in the Balkans.
(2) http://www.news:Rspain-monroeUR6ID_7F1@clari.net — a story about a short film purporting to show a young Marilyn Monroe engaging in explicit sex acts, and another story about sexually explicit films in Germany.
(3) http://www.stumedia.tsp.utexas.edu/webtexan. — *The Daily Texan*, the newspaper of the University of Texas at Austin, displays an editorial cartoon of a man, representing the student government, urinating on a copy of the newspaper in its February 7, 1997, edition.

This Court has long recognized that the press plays a vital role in promoting informed debate on matters of public concern. *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) ("[a] free press stands as one of the great interpreters between the Government and the people"). Although information posted on the Internet is available to anyone who seeks to gain access to it, the public relies on the press to keep it informed about important issues and events. In so doing, the press provides to the public a window through which it can scrutinize political and social events.

Nowhere is this role more critical than in facilitating the public oversight of Government activities. For example, "[i]nstead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media." *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring) ("attendance at court is no longer a widespread pastime," which "validates the media claim of functioning as surrogates for the public").

However, coverage of courts and trials involves the use of speech that arguably falls under the CDA's purview. Posted on *The Washington Post*'s website on February 7, 1997, was an article by reporter Anna Borgman about the trial of Timothy Bryan Chase, who was accused of raping a 15-year-old girl as her 7-year-old sister watched. http://www.washingtonpost.com. Although the article contains explicit language, it also informs the public about the functioning of the court and the administration of justice.

Additionally, numerous court opinions contain language that would arguably violate the CDA. For example, the Third Circuit was obliged to recount the graphic content of material in deciding whether a defendant, having been convicted for posses-sion of child pornography, was eligible under the Sentencing Guidelines for a reduction in his sentence for playing a minimal role in the offense. *U.S. v. Romualdi*, 101 F.3d 971 (3d Cir. 1996). Similarly, a defendant convicted of a capital offense appealed the presentation of his sexual predilections at the punishment stage of his trial, asserting that such evidence was overly prejudicial and irrelevant to the issue of his future dangerousness. *Boyle v. Johnson*, 93 F.3d 180 (5th Cir. 1996), *cert. denied*, 1997 U.S. Lexis 865 (U.S. February 18, 1997). In denying the *habeas corpus* petition, the court expressly referred to the graphic nature of the defendant's letters and drawings to hold that his obsession with sex led to a sexually motivated murder and reflected on his potential for future violence. Likewise, the Fourth Circuit explicitly referred to the verbal sexual harassment that the plaintiff alleged in determining that a same-sex harassment claim is not actionable under Title VII. *Mayo v. Kiwest Corp.*, 95-2638, 1996 U.S. App. Lexis 20445 (4th Cir. 1996) (*per curiam*).

A journalist writing about these cases would need to make express references to the language at issue. A news organization which posted such a story on the Internet could be subject to sanction under the CDA, despite this Court's

recognition that providing the rationale underlying Government decisionmaking promotes public understanding of our civil and political institutions, and is an essential function of a free press. *Nebraska Press Assn v. Stuart*, 427 U.S. 539, 586 (1976) (Brennan, J., concurring)

II. The Court should consider the inherent qualities of the medium rather than its novelty in determining the constitutionality of the CDA.

In light of the critical role of the press in informing the public about significant political, social and cultural matters, and the importance of Internet use by journalists, *amici* ask this Court to consider the unique and detrimental impact the CDA would have on the gathering and dissemination of news on the Internet.

As discussed *supra* at 3, every type of news media organization maintains websites where online versions of its material are posted. The very same story that is newsworthy, yet arguably indecent under the CDA, would be subject to the most exacting First Amendment protection in the print version, but would be criminalized in the online version. This inconsistency cannot be reconciled with this Court's First Amendment jurisprudence. *See New York Times v. United States*, 403 U.S. 713 (1971) (the Government is proscribed from enjoining publication of current news except in the most extreme circumstances); *Whitney v. California*, 274 U.S. 357, 377 (1927) ("[o]nly an emergency can justify repression" of First Amendment rights). *See also Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

A. The online news medium should receive the same exacting level of First Amendment protection as the print medium.

In reviewing content regulations on communications media, this Court, in the past, has considered the technical characteristics of the medium. *See Burstyn v. Wilson*, 343 U.S. 495 (1952) (noting that each medium of expression presents special First Amendment problems). Under this analysis, the Court granted the print media virtually unlimited First Amendment protection,[3] while the broadcast media, cable service providers and common carriers have received a lesser quantum of First Amendment protection. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989).

In enacting the CDA, instead of examining the inherent qualities of the medium, Congress focused on the novelty of the "brave new world" of Internet technology. 141 Cong. Rec. S8333 (daily ed. June 14, 1995) (remarks of Sen. Coats). As a consequence, the CDA is the most restrictive regulation applied to indecent speech found in any medium. The Government attempts to justify the CDA's unprecedented restrictions on Internet indecency using legal paradigms developed for other media. Brief of Appellants at 19. These rules cannot be applied to the Internet because the technical characteristics of the media are not analogous.

The lower court in the instant case agreed, concluding

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[3] *See Miami Herald v. Tornillo*, 418 U.S. 241 (1974); *Butler v. Michigan*, 352 U.S. 380 (1957). Exceptions to this rule have been carved out for obscenity, 18 U.S.C. §§ 1461-1465 (1994), and child pornography, 18 U.S.C. §§ 2251-2258 (1994), but not indecency.

that because content restrictions based on the technical characteristics unique to other media cannot be applied to the Internet, "Congress may not regulate indecency on the Internet at all." *ACLU v. Reno*, 929 F. Supp. 824, 877 (E.D. Pa. 1996).

If this Court should deem it necessary to draw an analogy to another medium in order to determine the constitutionality of the CDA, *amici* urge application of the least restrictive print model of content regulation to indecent speech on the Internet because the technical characteristics of the Internet more closely resemble print than any other medium. Like print, the Internet is primarily an active visual medium. Affirmative steps must be taken before messages can be read or understood. There is virtually no likelihood that anyone will stumble upon indecent expression unintentionally.

B. The *Pacifica* broadcast model does not fit the unique technology of the Internet.

This Court has held that the Government may regulate indecent expression when the audience is captive to a particular medium's message. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (holding that special treatment of indecent broadcasting is justified because of the pervasiveness of the medium); *Ginsberg v. New York*, 390 U.S. 629, 649 (1968) (Stewart, J. concurring) ("[w]hen expression occurs in a setting where the capacity to make a choice is absent, Government regulation of that expression may co-exist with and even implement First Amendment guarantees").

But, this Court has also held that where the capacity to make a choice is present — where the audience is not captive and affirmative steps must be taken to see or hear a message in a particular medium — expression in that medium cannot be regulated in the same way. *Sable Communications v. FCC*, 492 U.S. 115 (1989). In *Sable*, a case involving telephone

communications, the Court distinguished *Pacifica*, reasoning that "[t]here is no captive audience problem here; callers will generally not be unwilling listeners. . . . Placing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message." *Id.* at 127-128. Similarly, there is no captive audience problem with the Internet. The message contained on the computer screen can be avoided.

The Government heavily relies on this Court's holding in *Pacifica* to justify the content restrictions in this case. Brief of Appellants at 20-21. In *Pacifica*, this Court upheld the FCC's power to compel broadcasters to "channel" programming that the FCC found to be indecent to hours when unsupervised children were unlikely to be in the audience. *Pacifica*, 438 U.S. 726. The decision was based largely on the notion that broadcast media have "established a uniquely pervasive presence in the lives of all Americans." *Id.* at 726. This Court emphasized that its holding was narrow and has consistently refused to extend it to any other media. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989) (declining to apply the *Pacifica* rule to commercial telephone communication); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (declining to apply the *Pacifica* rule to cable television).[4]

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[4] In *Denver Area Educational Telecommunications Consortium v. FCC*, 116 S. Ct. 2374 (1996), the Court upheld a provision of the Cable Television Consumer and Competition Act of 1992 allowing cable system operators, not the government, to prohibit indecent programming over leased access channels. *Id.* But the Court struck down another provision that required indecent programming to be scrambled and subscribers to request access to that programming in writing. *Id.* The Court found that the scrambling and notice provisions were not the least restrictive means available to limit children's exposure to indecency. *Id.*

Nevertheless, the Government attempts to analogize *Pacifica* to the instant case. But these cases must be distinguished. The CDA ban on indecent speech is by far more restrictive than the broadcast restrictions upheld in *Pacifica*. There is no way to "time channel" content on the Internet. The CDA ban on Internet indecency necessarily extends to all hours of the day. Yet the Government attempts to force the Internet into the broadcast regulation model. The Internet simply does not fit.

The court below found the Government's argument wholly unpersuasive, holding that it "ignores *Pacifica's* roots as a decision in addressing the proper fit between broadcasting and the First Amendment . . . [and] assumes that what is good for broadcasting is good for the Internet." *Reno*, 929 F. Supp. at 874. *Amici* agree and urge this Court to recognize that *Pacifica* is not applicable to the medium of the Internet.

C. The CDA acts as an outright ban on newsworthy yet "indecent" speech and is therefore unconstitutional.

As noted *supra* at 3-7, reporting stories of great social import sometimes requires the use of speech that could be considered "indecent" under the CDA. This puts journalists in an untenable position. They must choose between posting a newsworthy story that might violate the CDA, subjecting themselves to criminal prosecution, or excluding from their website material that is protected by the First Amendment. In this context, the CDA may operate as a prior restraint or outright ban on indecent Internet speech effectively depriving adults access to that speech.

This Court has consistently held that outright bans on indecent speech are unconstitutional. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989) (striking down a statute banning indecent telephone messages); *Butler v.*

Michigan, 352 US 380, 381 (1957) (striking down a statute prohibiting the sale of "immoral, lewd, or lascivious" *i.e.*, indecent material as insufficiently tailored since it denied adults their First Amendment rights by limiting them to only what was acceptable for children).

Simply put, a regulation cannot, consistent with the Constitution, cut off an adult's access to indecent material in an effort to protect children from the alleged harmful effects of that material. *Sable*, 492 U.S. at 128. Yet this is precisely what the CDA does.

In its brief to the Court, the Government argues that the restrictions imposed by the CDA do not constitute an outright ban on indecent speech. Brief of Appellants at 33. These arguments are not persuasive.

The Government contends that the CDA does not operate as an outright ban on indecency because adults have reasonable alternatives to obtaining indecent material online. The Government asserts that "in addition to attending live theater and nightclubs, adults interested in indecent material can purchase tapes, compact discs, books, magazines, videotapes and CD Roms." Brief of Appellants at 28.

From the journalist's perspective, these are not reasonable alternatives. Obviously the current news of the day is not ordinarily available in theaters or nightclubs. Moreover, although newsworthy information may be available through alternative media, these media cannot be continuously updated and are not instantaneously accessible like the Internet. As discussed *supra* at 3, these characteristics have transformed the way news is disseminated allowing a global audience numbering in the millions to receive current news on demand. The CDA would force journalists to limit the news they place on the Internet to that which is fit for children, curtailing the public's access to a great deal of newsworthy information.

In addition, the Government's suggested alternatives cannot replace the Internet as a research tool for journalists. *See supra* at 2-3. The Government argues that the Internet's "unmatched potential" as a learning tool will be lost "if substantial numbers of people are unwilling to avail themselves of its benefits because they do not want their children exposed to patently offensive material." Brief of Appellants at 30. *Amici* believe this statement is illogical. In fact, the potential of the Internet will be lost if information providers are unwilling to post material that even arguably could be considered indecent because they do not want to risk criminal liability for violating the CDA. The adverse impact on newsgathering is obvious; information sources would dry up.

As noted *supra* at 4, many websites operated by educational institutions, research centers, nonprofit organizations, and even Government agencies contain information of great social, political, and scientific significance that is arguably indecent under the CDA. This information is extremely useful to journalists in developing news reports about newsworthy matters. However, should these website operators choose to remove the arguably indecent speech from their websites rather than risk violating the law, journalists will find it far more difficult to gain access to this information and consequently, will be less able to keep the public informed about such newsworthy matters.

The Government also argues that the CDA does not act as a complete ban on indecent speech because the statutory defenses act as a safe harbor allowing speakers to post indecent speech on the Internet as long as they restrict access to indecent materials "by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number," 47 U.S.C. § 223(e)(5)(B) or otherwise take "in good faith, reasonable, effective and appropriate actions . . . to restrict or prevent access to minors." 47 U.S.C. § 223(e)(5)(A). *See* Brief of Appellants at 27. However, these

defenses are impractical and, if employed, would restrain rather than encourage free expression.

The defenses would not provide a safe harbor for journalists disseminating news. News organizations publish huge amounts of information in which minors as well as adults have a legitimate need and interest. In order to avoid prosecution under the CDA, news organizations would have no choice but to evaluate every single news item made available online, which can number in the hundreds each day, in an attempt to identify those that might arguably fall within the definition of "indecent" or "patently offensive" and restrict minors' access to those items. Given the complication, uncertainty, time and expense involved in such an endeavor, most online news providers would have no choice but to attempt to deny minors access to all material they electronically publish. Thus the potential of the Internet as an educational tool for students would be seriously compromised, if not destroyed.

The court below determined that "most content providers cannot determine the identity and age of every user accessing their material." *Reno*, 929 F. Supp. at 854. Journalists are no different. Some of the most respected news organizations in the nation now make their entire story archives available online to anyone, including *The Christian Science Monitor*, http://www.csmonitor.com; *Sacramento Bee*, http://www.sacbee.com; *St. Louis Post-Dispatch*, http://www.stlnet.com; *Kansas City Star*, http://www.kcstar.com and *Detroit News*, http://www.detnews.com. These publications might well decide to simply eliminate stories containing arguably indecent speech from their online publications, even if the stories are of great social import, rather than risk criminal liability for violating the CDA. In this context, the CDA operates as an outright ban on indecent speech.

In addition, any form of verification that requires users

to identify and register themselves by name may act as a prior restraint. *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 116 S.Ct. 2374, 2391 (1996) (holding a written notice requirement akin to registration "will further restrict viewing by subscribers who fear for their reputations should the operator . . . disclose the list of those who wish to watch the 'patently offensive channel'").

Moreover, registration might destroy journalists' ability to conduct research anonymously, undermining their efforts to discover factual information in some investigative situations. *See Philip Morris Co. v. ABC, Inc.*, 36 Va. Cir. 1; 1995 Va. Cir. Lexis 1250 at *35 (Cir. Ct. Richmond) (Aug. 4, 1995) (extending qualified reporter's privilege to journalists' transactional telephone, hotel and credit card records, noting that although it may be possible to gather news without utilizing them, "these alternative means of research . . . in today's society are unreasonable and would unduly burden and infringe upon First Amendment freedoms"); *Food Lion Inc. v. Capital Cities/ABC Inc.*, No. 6:92CV00592, Scheduling and Discovery Order, (D. N.C. Sept. 6, 1996) (barring discovery of journalists' hotel, mail service and telephone records) (citing *Philip Morris Co. v. ABC, Inc.*).

For these reasons, the CDA would operate as a complete and total ban of indecent speech on the Internet in violation of the First Amendment and the principles this Court upheld in *Sable*, 492 U.S. at 131.

III. Enforcement of the CDA would result in significant restrictions on journalists' ability to do their jobs.

A. The CDA's criminal sanctions will act as a prior restraint by discouraging publication of newsworthy material.

The CDA would subject Internet information providers

to criminal penalties for posting indecent speech. The threat of criminal prosecution would inevitably operate as a prior restraint on the news media, chilling free expression and discouraging publication of newsworthy stories. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257 (1974) (fear of post-publication punishment may act as a prior restraint causing news coverage to be "blunted or reduced"). *See* Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 Minn. L. Rev. 11 (1981) (equating the chilling effect of prior restraints and post-publications sanctions). As the court below noted,

> [c]riminal prosecution, which carries with it the risk of public obloquy as a well as the expense of court preparation and attorneys' fees, could itself cause incalculable harm. No provider . . . is likely to willingly subject itself to prosecution for a miscalculation of the prevalent community standards or for an error in judgement as to what is indecent.

Reno, 929 F. Supp. at 856.

This Court has held that a prior restraint might be valid under three exceptional circumstances: the published material was obscene, would breach national security, or would incite acts of violence or violent overthrow of the Government. *Near v. Minnesota*, 283 U.S. 697 (1931). The Government interest in the instant case simply does not justify an absolute proscription of indecent speech on the Internet. *Amici* urge this Court to strike down the CDA as an unconstitutional prior restraint.

B. Recently enacted law has weakened protection against newsroom searches, and the CDA could further undermine these protections.

Amici are alarmed at what appears to be increasing

Governmental ambivalence toward journalists' privacy rights. In criminalizing indecency, the CDA could give the Government one more opportunity to search newsrooms and seize reporters' research materials and work product under the guise of protecting children from the harmful effects of indecent speech.

To illustrate this point, recently enacted legislation, prompted by concerns over the use of computer technology to produce and transmit child pornography, has significantly weakened protection against Government intrusion into newsrooms. The Child Pornography Prevention Act of 1995 (hereinafter CPPA), signed into law in September 1996 as part of the Federal Omnibus Appropriations Bill, Section 121, creates a new exemption to the Privacy Protection Act, 42 U.S.C. § 2000aa, permitting newsroom searches for and seizures of materials relating to child pornography and child exploitation offenses.

Since the Privacy Protection Act became law in 1981, it has been unlawful for law enforcement officials to search for or seize newsroom materials in most situations. In cases where possession or communication of such materials is a crime, search and seizure of work product or documentary materials, which include reporters' notes and/or research materials, were permitted only if the offense involved national security or classified information. *Id.* Under the Privacy Protection Act, journalists had an extra layer of protection, beyond the Fourth Amendment, because the Act provided civil penalties for its violation. But as amended by the CPPA, law enforcement officials may now search newsrooms to look for and seize child pornography and exploitation materials without incurring civil penalties. *See* Jim Fisher, *Researchers Fear Hatch's Porn Bill*, Salt Lake Trib., Aug. 21, 1996 at A-1.

The CDA would effectively place indecency in the same criminal category as child pornography and espionage. This could eventually subject indecent material to the provisions of

the CPPA (or similar legislation), resulting in additional searches of newsrooms and seizures of journalists' work product and documentary materials. *See Steve Jackson Games, Inc. v. U.S. Secret Service*, 816 F. Supp. 432 (W.D. Tex. 1993) (recognizing that the Privacy Protection Act applies to new media including computer bulletin boards). "In the modern electronic newsroom, a police search may well become an official intrusion into the technological mind and memory of the reporters and editor." Rodney A. Smolla, *Free Speech in an Open Society* 276 (1992). *Amici* urge this Court to consider the detrimental impact the CDA may have on journalists' privacy rights in light of the recently weakened prohibition against newsroom searches.

C. The statute is not saved by Government assertions of benign enforcement.

Journalists can take little comfort in Government assurances that it would apply the CDA in a way that would avoid prosecution for placing meritorious works on the Internet. In other contexts, the Government has declined to categorically insulate news broadcasts from indecency restrictions.[5] For

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[5] There have been indecency challenges to news programs, although the FCC did not impose sanctions in those cases. For example, a listener filed a letter of complaint with the FCC against National Public Radio for an evening broadcast about organized crime in which John Gotti used expletives. The FCC determined that the material in question was "not actionably indecent" pursuant to the governing statute. *Letter Ruling*, 6 F.C.C.R. 610 (1991). The D.C. Circuit did not reach the merits on appeal, instead dismissing the case for lack of standing. *Branton v. FCC*, 993 F.2d 906 (D.C. Cir. 1993), *cert. denied*, 114 S.Ct. 1610 (1994). In another case, the FCC determined that a local television documentary that included "candid discussions of sexual topics" and the use of "sex organ

example, the FCC has refused to furnish news broadcasts with a blanket exemption from its indecency regulations. *In the Matter of Enforcement of Prohibitions Against Broadcast Indecency*, 8 F.C.C.R. 704, 709 (1993); *In re Infinity Broadcasting Corp.*, 3 F.C.C.R. 930, 932, 937 n.28 (1987).

The FCC has also refused to provide broadcasters with comprehensive guidance as to whether particular news or public-affairs programs might be considered indecent. *In re Petition for Clarification*, 59 F.C.C.2d 892, 893 (1976) (invoking its "long standing policy of refusing to issue interpretive rulings or advisory opinions" when the critical facts are not explicitly stated or there is a possibility that subsequent events will alter them). The uncertainty that results from unclear standards can only lead to the chilling of material, regardless of its merit. *Action for Children's Television v. FCC*, 58 F.3d 654, 685 (D.C. Cir. 1995) (Wald, J. dissenting) (enforcement of unclear indecency regulations for broadcasters leads to "both government and self-censorship"), *cert. denied*, 116 S.Ct. 701 (1996).

Moreover, as recognized by the lower court, the statute is not "readily susceptible" to the Government's narrow construction. *Reno*, 929 F. Supp. at 854 (citing *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988). There is no evidence in the legislative history that Congress intended to narrow the scope of the CDA or to create special exceptions for news. The statute's reach is not limited to commercial pornographers, and Congress did not include language that would define "patently offensive" or "indecent" to exclude material of serious value. *Reno*, 929 F. Supp. at 855.

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models to simulate the use of various birth control devices" was not indecent. KING-TV, *Memorandum Opinion*, 5 F.C.C.R. 2971 & n.2 (1990).

Fortunately, as the lower court opined, the First Amendment does not "require us to entrust the protection it affords to the judgment of prosecutors." *Id.* Accordingly, notwithstanding the Government's interpretation, the CDA cannot survive constitutional scrutiny.

CONCLUSION

The vitality of our civil and political institutions depends on an educated citizenry that engages in open and free discussion about a broad range of matters of public concern. The right to speak freely and to promote diversity of ideas and programs is one of the chief distinctions that sets us apart from totalitarian regimes. *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937) (the free exchange of ideas ensures the meaningful exercise of political freedom).

The press plays a decisive role in shaping and facilitating public debate. *Board of Education v. Pico*, 457 U.S. 853, 859 (1982).

> As money is to the economy, so the press is to our political culture; it is the medium of circulation. It is the currency through which the knowledge of recent events is exchanged; the coin by which *public* discussion may be purchased.

Address by Justice William Brennan, 32 Rutg. L. Rev. 173, 175 (1979).

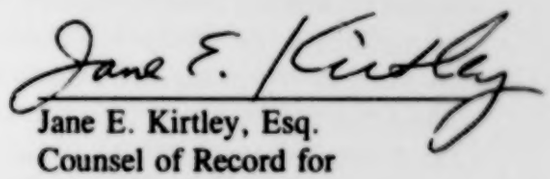
Therefore, news and commentary on public issues lie "at the heart of First Amendment protection." *FCC v. League of Women Voters*, 468 U.S. 364, 381 (1984).

Because of the detrimental impact that the CDA would have on newsgathering and dissemination, *amici* urge this Court to uphold the lower court's decision. Material which has serious

literary, artistic, political or scientific merit is entitled to the broadest protection under the First Amendment, regardless of whether it is also arguably indecent or patently offensive to minors and regardless of the medium in which it is transmitted.

For the foregoing reasons, *amici* respectfully request that this Court affirm the lower court's decision.

Respectfully submitted,



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No. 96-511

(23)

Supreme Court, U.S.
FILED
FEB 20 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JANET RENO, ATTORNEY GENERAL
OF THE UNITED STATES, et al.,

Appellants,

—v.—

AMERICAN CIVIL LIBERTIES UNION, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF AMICI CURIAE OF THE NATIONAL ASSOCIATION OF BROADCASTERS; ABC, INC.; CBS INC.; AND NATIONAL BROADCASTING COMPANY, INC. IN SUPPORT OF APPELLEES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-511

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, et al.,

Appellants,

—v.—

AMERICAN CIVIL LIBERTIES UNION, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF AMICI CURIAE OF THE NATIONAL ASSOCIATION OF BROADCASTERS; ABC, INC.; CBS INC.; AND NATIONAL BROADCASTING COMPANY, INC. IN SUPPORT OF APPELLEES

PRELIMINARY STATEMENT

This brief is respectfully submitted on behalf of the National Association of Broadcasters; ABC, Inc.; CBS Inc.; and National Broadcasting Company, as *amici curiae* in support of affirmance of the preliminary injunction entered against enforcement of the criminal provisions of the Communications Decency Act of 1996, Pub. L. No. 104-104, 100 Stat. 133. Pursuant to Rule 37(3)(a) of the rules of this Court,

amici have obtained and filed the written consents of the parties to the filing of this brief.

The purpose of this brief is to address a single issue that may arise in the Court's analysis of the application of the First Amendment to the Internet. It is the level of First Amendment protection afforded to broadcasters—a topic frequently addressed by this Court in the past, but never dealt with in light of the most recent examination by and ruling of the Federal Communications Commission that bears directly on the issue. This brief deals with (and annexes) that ruling—the *Syracuse Peace Council* case[1]—and urges the Court that when it next addresses the issue (whether or not in this case), the spectrum scarcity rationale that has led to reduced First Amendment protection for television and radio broadcasters should be abandoned.

INTEREST OF AMICI CURIAE

The National Association of Broadcasters ("NAB"), a nonprofit incorporated association, is the leading trade association of television and radio stations and networks in the United States, and serves and represents the American broadcasting industry. ABC, Inc. ("ABC"); CBS Inc. ("CBS"); and National Broadcasting Company, Inc. ("NBC") each operate, directly or through their subsidiaries, national broadcast networks and are engaged, *inter alia*, in producing news, sports and entertainment programming and disseminating that programming to the public through their owned and affiliated broadcast stations throughout the country as well as through sites on the Internet. As a result, *amici* have a clear stake in any decision or statement by this Court that might affect the First Amendment status of broadcasters. In particular, NAB, ABC, CBS, and NBC are concerned that in the course of its

[1] *In re Complaint of Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987), *aff'd, Syracuse Peace Council* v. *FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

opinion in this case, the Court may repeat prior statements or legal conclusions about the supposed lesser level of First Amendment protection afforded to broadcasters without taking the Commission's most recent—and definitive—ruling into account which would require reexamination of those conclusions. For this reason and to support broad First Amendment protection for all speech, including speech via the Internet, NAB, ABC, CBS, and NBC submit this brief.

SUMMARY OF ARGUMENT

Almost thirty years ago, the Court held that broadcasters should receive a lesser degree of First Amendment protection than other speakers, based in large part on the then-existing technology. Since that time, the Court has acknowledged its willingness to reconsider its decision if it received a "signal" from Congress or the Federal Communications Commission ("FCC") that technological advances required revision of the system of broadcast regulation. In its ruling abandoning the Fairness Doctrine, the FCC sent that signal in the clearest and most unambiguous of terms. In the intervening decade, a technological explosion (of which the development of the Internet is but one part) has occurred which has weakened still further any notion that "spectrum scarcity" could justify diminished First Amendment protection for broadcasters. Now, as the Court embarks on its analysis of First Amendment protection on the Internet, *amici* urge the Court to refrain from relying on any generalized notion that broadcasters should receive a lesser form of First Amendment protection and to await a case in which the issue of the continued viability of the spectrum scarcity rationale is squarely presented before passing on that issue.

ARGUMENT

"SPECTRUM SCARCITY" CAN NO LONGER SERVE AS A BASIS FOR AFFORDING DIMINISHED FIRST AMENDMENT PROTECTION TO BROADCASTERS

This Court has often observed that different media receive different levels of First Amendment protection. *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 557 (1975) ("Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."); *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 748 (1978) ("We have long recognized that each medium of expression presents special First Amendment problems."); *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 501 (1981) ("Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method.").

On the First Amendment continuum, courts have accorded the highest level of protection to newspapers and other print media. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). Broadcasters have received a lower level of protection, with cable television falling somewhere in the middle. *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622, 637 (1994) ("[O]ur cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media."); *Denver Area Educ. Telecommunications Consortium, Inc.* v. *FCC*, 116 S. Ct. 2374, 2401 (1996) (Souter, J., concurring) ("[W]e have found cable television different from broadcast with respect to the factors justifying intrusive access requirements. . . .").

The lower level of protection for broadcasters has its roots in the regulation of radio broadcasters in the 1920s and this Court's 1943 decision in *National Broadcasting Co.* v. *United States*, which cited the limited radio broadcast facilities available at the time as a justification for content-based regulation

of speech. 319 U.S. 190, 216-17 (1943). In 1969, the Court revisited the issue of broadcast scarcity in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), and upheld the so-called "Fairness Doctrine," grounding its decision on the limited number of outlets for communication available in "the present state of commercially acceptable technology." *Id.* at 388. However, even as the Court upheld the Fairness Doctrine, it indicated its willingness to reconsider the decision at a later date. *Id.* at 393. This openness to reexamine its ruling in light of changed technological developments is consistent with the Court's later observation that

> "[t]he problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence." *Columbia Broadcasting System, Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973).

A similar view was expressed recently by Justice Souter in his cautionary admonition in *Denver Area Educ. Telecommunications Consortium, supra*, that

> "because we know that changes in . . . regulated technologies will enormously alter the structure of regulation itself, we should be shy about saying the final word today about what will be accepted as reasonable tomorrow." 116 S. Ct. at 2402 (Souter, J., concurring).

In the nearly thirty years since *Red Lion*, the Court has continued to restate its holding, while often noting the existence of an extensive body of criticism of the scarcity rationale. In *Turner Broadcasting, supra,* the Court signaled its own unease with the scarcity rationale, stating that the "rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, *whatever its validity* in the cases elaborating it, does not apply in the context of cable regulation." 512 U.S. at 637 (emphasis added). The Court also

recognized that "courts and commentators have criticized the scarcity rationale since its inception," *id.* at 638, and cited to *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984). There, the Court observed that

> "[t]he prevailing rationale for broadcast regulation on spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete." *Id.* at 376 n.11.

It then stated:

> "We are not prepared . . . to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." *Id.*

Three years later, the Federal Communications Commission sent that signal. Stating, *inter alia*, that "the scarcity rationale . . . no longer justifies a different standard of First Amendment review for the electronic press," the Commission abandoned the Fairness Doctrine. *In re Complaint of Syracuse Peace Council*, *supra*, 2 F.C.C.R. at 5053; App. 61a. In its ruling, the Commission stated:

> "We . . . believe, as the Supreme Court indicated in *FCC* v. *League of Women Voters of California*, that the dramatic transformation in the telecommunications marketplace provides a basis for the Court to reconsider its application of diminished First Amendment protection to the electronic media." *Id.* at 5058; App. 89a.

The *Syracuse Peace Council* ruling was the culmination of years of proceedings over a Fairness Doctrine complaint lodged against a television station in Syracuse, New York. The dispute began in 1982 when station WVTH ran a series of

advertisements supporting the construction of the Nine Mile II nuclear power plant. Syracuse Peace Council complained to the FCC that the licensee of the station, Meredith Corporation, had failed to provide viewers with conflicting perspectives on the power plant and had thereby violated the Fairness Doctrine. The FCC initially agreed with the Syracuse Peace Council, 99 F.C.C.2d 1389 (1984), and later refused to address Meredith's constitutional defenses on its motion for reconsideration. 59 Rad. Reg. 2d (P&F) 179 (1985). On appeal, the District Court reversed and remanded, instructing the Commission to consider the station's constitutional defenses. *Meredith Corp.* v. *FCC*, 809 F.2d 863 (1987).

On remand, the Commission exhaustively reviewed the legal and factual predicates underlying both the Fairness Doctrine and the lower level of First Amendment protection accorded broadcasters. Because this issue has never been fully briefed to the Court and because the Commission's ruling was a direct response to this Court's invitation in *League of Women Voters*, we attach the Commission's entire ruling as an Appendix to this brief.

Certain passages of the ruling warrant the Court's particular attention. According to the Commission:

> "[T]he extraordinary technological advances that have been made in the electronic media since the 1969 *Red Lion* decision, together with a consideration of fundamental First Amendment principles, provide an ample basis for the Supreme Court to reconsider the premise or approach of its decision in *Red Lion*." 2 F.C.C.R. at 5048; App. 38a.

Writing in 1987, the Commission noted that the number of television stations had increased fifty-four percent since the *Red Lion* decision and that the number of radio stations had increased fifty-seven percent during that time. *Id.* at 5051; App. 54a. Furthermore,

> "[n]ot only has the number of television and radio stations increased the public's access to a multiplicity of

media outlets since 1969, but the advent and increased availability of such other technologies as cable and satellite television services have dramatically enhanced that access."[2] *Id.*; App. 54a.

The Commission rejected the scarcity rationale in its entirety, concluding that "[w]e do not believe that any scarcity rationale justifies differential First Amendment treatment of the print and broadcast media." *Id.* at 5054.; App. 67a. Citing Judge Bork's trenchant opinion in *Telecommunications Research and Action Ctr.* v. *FCC*, 801 F.2d 501 (D.C. Cir.), *reh'g denied*, 806 F.2d 1115 (1986), *cert. denied*, 482 U.S. 919 (1987), in which he criticized the scarcity rationale,[3] the Commission noted

> "that the limits on the number of persons who can use frequencies at any given time is not absolute, but is, in part, economic: greater expenditures on equipment and/or advances in technology could make it possible to utilize the spectrum more efficiently in order to permit a greater number of licensees. So the number of outlets in a market is potentially expandable, like the quantities of most other resources." *Id.* at 5045-55; App. 69a.

Summing up its position, the Commission stated: "[W]e simply believe that, in analyzing the appropriate First Amendment standard to be applied to the electronic press, the concept of scarcity—be it spectrum or numerical—is irrelevant." *Id.* at 5055; App. at 73a-74a. Accordingly,

> "we believe that an evaluation of First Amendment standards should not focus on the *physical differences* between the electronic press and the printed press, but on the *functional similarities* between these two media and upon the underlying values and goals of the First Amendment. We believe that the function of the electronic press in a free society is identical to that of the printed press and that, therefore, the constitutional analysis of government control of content should be no different." *Id.* at 5055; App. 74a.

The ultimate conclusion asserted in the Commission's *Syracuse Peace Council* ruling was unambiguous: "We believe that the *1985 Fairness Report*,[4] as reaffirmed and further elaborated on in today's action, provides the Supreme Court

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[2] Since the time of *Syracuse Peace Council*, the number of media outlets has continued to increase. For example, from January 1988 to January 1996, the number of television stations on the air has increased from 1342 to 1544, and the number of radio stations on the air has increased from 10,244 to 12,001. *See Broadcasting & Cable Yearbook 1996* at B-671, C-244. Additionally, the revolution in computer-based communications in which "[a]s many as 40 million people in the world use the Internet today, and [which] is expected to grow to 200 million by 1999" has drastically increased the number of outlets for both speakers and listeners. Brief of United States at 28.

[3] According to Judge Bork:

> "[T]he line drawn between the print media and the broadcast media, resting as it does on the physical scarcity of the latter, is a distinction without a difference. Employing the scarcity concept as an analytic[al] tool . . . inevitably leads to strained reasoning and artificial results.
>
> "It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism. Not everyone who wishes to publish a newspaper, or even a pamphlet, may do so. Since scarcity is a universal fact, it can hardly explain regulation in one context and not another." 801 F.2d at 508.

See also Action for Children's Television v. *FCC*, 58 F.3d 654, 675 (D.C. Cir. 1995) (Edwards, C.J., dissenting), *cert. denied*, 116 S. Ct. 701 (1996) ("In response to the economic scarcity argument—that there are more would-be broadcasters than spectrum frequencies available—economists argue that all resources are scarce in the sense that people often would like to use more than exists.").

[4] *Inquiry into Section 73.190 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143 (1985).

with the signal referred to in *League of Women Voters*." *Id.* at 5053; App. 65a. The Commission further stated that its ruling provided the Court

> "the basis on which to reconsider its application of constitutional principles that were developed for a telecommunications market that is markedly different from today's market. We further believe that the scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press. Therefore, in response to the question raised by the Supreme Court in *League of Women Voters*, we believe that the standard applied in *Red Lion* should be reconsidered and that the constitutional principles applicable to the printed press should be equally applicable to the electronic press." *Id.*; App. 61a-62a.

In the decade since the Commission rejected the continuing viability of spectrum scarcity as a rationale for reduced First Amendment protection and consequently abandoned the Fairness Doctrine, that position has been reaffirmed by the Commission, *Arkansas AFL-CIO* v. *Television Station KARK-TV*, 7 F.C.C.R. 541, 542 (1992), and acknowledged by courts of appeal. For example, the Eighth Circuit noted that "In *Syracuse Peace Council*, the D.C. Circuit credited the FCC's testimony that the dramatic increase in media outlets since 1959 [sic] eliminated the need for the fairness doctrine." *Arkansas AFL-CIO* v. *FCC*, 11 F.3d 1430, 1442 (8th Cir. 1993) (en banc).

Chief Judge Richard S. Arnold, concurring in the same case, concluded:

> "The *Red Lion* holding . . . was premised on the scarcity of broadcast frequencies available for licensing, and the Court's opinion explicitly indicated that its view might change if more spectrum space became available, or if experience with the fairness doctrine indicated that it was reducing rather than enhancing the amount of information available to the public.
>
> "Developments since 1969 make it likely, in my view, that the holding of *Red Lion* would be reconsidered. For one thing, the FCC has given the 'signal' referred to in *League of Women Voters*, *supra*. The Commission has indicated both that the problem of spectrum scarcity is rapidly disappearing and that the fairness doctrine has had a chilling effect on the willingness of broadcast stations to cover controversial matters of public importance. Whether the Supreme Court reexamines *Red Lion* is its business, not ours. But developments subsequent to *Red Lion* appear at least to raise a significant possibility that the First Amendment balance struck in *Red Lion* would look different today." 11 F.3d at 1443 (Arnold, C.J., concurring) (citations omitted).

A similar view was expressed by Chief Justice Edwards of the D.C. Circuit in *Action for Children's Television*, *supra*, who noted:

> "Although the Supreme Court has not declared the distinction between broadcast and other media a dead one, it has not lately given the distinction an enthusiastic endorsement. In fact, in recent years the Court has only grudgingly upheld the distinction." 58 F.3d at 674 (Edwards, C.J., dissenting).

Judge Edwards concluded:

> "In my view, it is no longer responsible for courts to apply a reduced level of First Amendment protection for regulations imposed on broadcast based on an indefensible notion of spectrum scarcity. It is time to revisit this rationale."[5] *Id.* at 675.

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[5] In a recent opinion of Judges Williams, Edwards, Silberman, Ginsburg and Sentelle (dissenting from a denial of rehearing *en banc* in a case involving the 1992 Cable Act's requirements with respect to direct

In the district court opinion below, Judge Dalzell reviewed the continuum of First Amendment protection accorded different media. *American Civil Liberties Union* v. *Reno*, 929 F. Supp. 824, 873-77 (E.D. Pa.), *prob. juris. noted*, 117 S. Ct. 554 (1996). In the course of this review, he stated that spectrum scarcity "allows the Government to regulate content even after it assigns a license." *Id.* at 874. Regrettably, his statement is an accurate articulation of the current state of First Amendment jurisprudence. *Amici* submit, however, that in light of *Syracuse Peace Council* and the explosive developments in the telecommunications area in the past decade, including the extraordinary development of the Internet, abandonment of the spectrum scarcity rationale may commend itself to this Court.

With that in mind, *amici* urge the Court to refrain in this action from relying on any generalized notion that broadcasters should receive some form of watered-down First Amendment protection. After all, *Red Lion* itself did not purport to offer a "final word" on anything; it was explicitly based on the then "present state of commercially acceptable technology," 395 U.S. at 388. So much has changed since then that we think it appropriate to urge the Court now to avoid any reassertion of a doctrine that is so subject to reassessment and of such dubious continuing validity.[6]

---

broadcast satellite), they noted that the continuing "intense criticism" of *Red Lion* stemmed partly from

> "the perception that the 'scarcity' rationale never made sense—in either its generic form (the idea that an excess of demand over supply at a price of zero justifies a unique First Amendment regime) or its special form (that broadcast channels are peculiarly rare)"

and partly from "the growing number of available broadcast channels." *Time Warner Entertainment Co.* v. *FCC*, __ F.3d. __, 1997 WL 47179 at *6 n.1 (D.C. Cir 1997) (Williams, J., dissenting).

[6] The only other basis that has been cited for affording broadcasters a lower level of protection than other speakers is the conclusion of the Court in *Pacifica*, *supra*, that the "uniquely pervasive" characteristics of radio justified differential constitutional treatment of indecent expression in that medium. 438 U.S. at 748. *Amici* will leave it to the parties to address the applicability of *Pacifica* to this case except to note:

(a) *Pacifica* itself may well have been based upon the very notion of spectrum scarcity addressed in this brief. *Compare Turner Broadcasting*, *supra*, 512 U.S. at 639 (rejecting broadcast rationale for cable because of "fundamental technological differences between broadcast and cable transmission") *with Denver Area Educ. Telecommunications Consortium*, *supra*, 116 S. Ct. at 2388 (plurality opinion) (applying broadcast rationale to cable re indecent programming because "cable and broadcast television differ little, if at all" as regards the viewer);

(b) the Court itself has noted that the plurality opinion in *Pacifica* "did not command a majority of the Court." *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 390 n.6 (1992); and

(c) *Pacifica* has been the subject of such sustained criticism that it should, at the least, be revisited by the Court before its adoption by a majority of the Court as a basis for regulation of all media that enter the home—or any of them. *See, e.g.*, Lucas A. Powe, *American Broadcasting and the First Amendment*, 209-15 (1987) (criticizing decision as "puzzling," "troublesome" and "mystifying"); 4 Ronald D. Rotunda & John E. Nowak, *A Treatise on Constitutional Law*, § 20.18 at 102 (2d ed. 1992) (describing *Pacifica* as "a disquieting and significant departure from traditional first amendment theory"); Laurence H. Tribe, *American Constitutional Law* § 12-18 at 935-38 (2d ed. 1988) (criticizing *Pacifica*); Archibald Cox, *The Supreme Court, 1979 Term; Forward: Freedom of Expression in the Burger Court*, 94 Harv. L. Rev. 1, 45 (1980) (explaining *Pacifica* as "a narrow, highly particular decision pushing a number of doctrinal exceptions to first amendment principles to their limits because the exceptions conjoin").

CONCLUSION

The decision of the United States District Court for the Eastern District of Pennsylvania should be affirmed.

Dated: February 20, 1997

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APPENDIX

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FCC 87-266

In re Complaint of

SYRACUSE PEACE COUNCIL

—against—

TELEVISION STATION WTVH,
Syracuse, New York

MEMORANDUM OPINION AND ORDER

Adopted: August 4, 1987; Released August 6, 1987

By the Commission:

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I. INTRODUCTION

1. In *Meredith Corp. v. FCC*,[1] the United States Court of Appeals remanded this case to the Commission for further consideration of our decision, in this adjudication, to enforce the fairness doctrine[2] against station

[1] 809 F.2d 863 (D.C. Cir. 1987).

[2] The fairness doctrine, as developed by the Commission, places a two part obligation upon broadcast licensees. First, broadcasters have an affirmative obligation to cover vitally important controversial issues of interest in their communities. Second, they are obligated to provide a reasonable opportunity for the presentation of contrasting viewpoints

WTVH.[3] The court found that the Commission, on the basis of the evidence of record, had properly concluded that the station failed to satisfy the requirements of the fairness doctrine. It determined, however, that the Commission had acted arbitrarily and capriciously in not considering WTVH's contentions that the enforcement of the doctrine deprived the station of its constitutional rights.

2. Pursuant to the court's Order, we reopened this proceeding in order to consider the constitutional and public interest issues raised by WTVH.[4] In light of "the general importance of the issues in this particular case,"[5] we pub-

on those controversial issues of public importance that are covered. *See, e.g., Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 110-11 (1973); *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 516 (D.C. Cir.), *pet. for reh. en banc denied*, 806 F.2d 111 (D.C. Cir. 1986), *cert. denied*, 55 U.S.L.W. 3821 (U.S. 1987) (*TRAC v. FCC*); *Fairness Report* in Docket No. 19260, 48 FCC 2d 1 (1974), *recon. denied*, 58 FCC 2d 691 (1976), *aff'd sub nom. National Citizens Committee for Broadcasting v. FCC*, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978) (*1974 Fairness Report*). The violation at issue in this case involved the second part of the fairness doctrine.

[3] *Syracuse Peace Council v. Television Station WTVH Syracuse, New York*, 99 FCC 2d 1389 (1984), *recon. denied*, FCC 85-571 (released Oct. 30, 1985), *remanded sub nom. Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987) (*Syracuse Peace Council v. Television Station WTVH*).

[4] Congress has instructed the Commission "to consider alternative means of administration and enforcement of the Fairness Doctrine and to report to the Congress by September 30, 1987." Making Continuing Appropriations for Fiscal Year 1987, Pub. L. No. 99-91, Title 5, 407, 100 Stat. 3341-66 (1986), initially assigned Pub. L. No. 99-500, Title 5, 407, 100 Stat. 1983-66) (1986). *See Inquiry Into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees* in MM Docket No. 87-26, FCC 87-67 (released Feb. 19, 1987), 52 Fed. Reg. 7626 (March 12, 1987). In compliance with this congressional directive, we have today adopted a "Report of the Commission" addressing these alternatives (*Fairness Alternatives Report*).

[5] *Syracuse Peace Council v. Television Station WTVH*, FCC 87-33 (released Jan. 23, 1987), 52 Fed. Reg. 2805-01, at 2 (Jan. 27, 1987) (*Order Requesting Comment*).

lished a notice in the Federal Register inviting comment from interested members of the public as well as from the parties to this adjudication. As explained more fully below, based upon this record, our experience in administering the fairness doctrine, fundamental constitutional principles, and the findings contained in our comprehensive *1985 Fairness Report*,[6] we conclude that the fairness doctrine, on its face, violates the First Amendment and contravenes the public interest. Accordingly, we shall grant reconsideration of our earlier determinations in this proceeding, and our previous orders in this proceeding are hereby vacated. Any formal determination that WTVH failed to comply with the requirements of the fairness doctrine can no longer be used against WTVH in any subsequent renewal proceedings or in any other context.[7]

II. BACKGROUND

A. 1985 FAIRNESS REPORT

3. As the Court noted in *Meredith Corp. v. FCC*, the Commission recently conducted "a comprehensive reexamination of the public policy and constitutional implications of the fair-

[6] *Inquiry Into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees* in Gen. Docket No. 84-282, 102 FCC 2d 145 (1985), *petition for review docketed sub nom. Radio-Television News Directors Association v. FCC*, No. 85-1691 (D.C. Cir. filed Oct. 22, 1985) (*1985 Fairness Report*). The findings contained in that *Report* are summarized *infra*, at 3-6.

[7] As noted above, the court in *Meredith Corp. v. FCC* held that the agency acted unlawfully in enforcing the fairness doctrine without considering whether this action was constitutional. It remanded the case to the Commission to consider the constitutional issues raised by Meredith, or, alternatively, to consider whether enforcement of the doctrine was contrary to public policy. There is no explicit language in the court's decision vacating or reversing the Commission's earlier orders, and consequently we believe that our previous orders determining that WTVH had violated the fairness doctrine and denying reconsideration of that determination remained in effect after the court's decision. We therefore vacate those orders in today's action.

ness doctrine."[8] During the course of that proceeding, the Commission considered more than one hundred formal comments and reply comments, hundreds of informal submissions, and oral arguments presented in two full days of hearings. The inquiry culminated in the *1985 Fairness Report* released by the Commission on August 23, 1985.[9] Because we believe that the determinations made in the *1985 Fairness Report* are directly relevant to the issues on remand, in this section we shall briefly summarize the major conclusions of that *Report* before describing the history of this proceeding.

4. Based upon compelling evidence of record, the Commission, in its *1985 Fairness Report*, concluded that the fairness doctrine disserved the public interest. Evaluating the explosive growth in the number and types of information sources available in the marketplace, the Commission found that the public has "access to a multitude of viewpoints without the need or danger of regulatory intervention."[10] The

[8] *Meredith v. FCC*, 809 F.2d at 868. *1985 Fairness Report*, *supra* note 6. Because " 'regulatory agencies do not establish rules of conduct to last forever,' " *Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1982), quoting *American Trucking Association, Inc. v. Atchison, Topeka & Santa Fe Railway Co.*, 387 U.S. 397 (1967), the courts have recognized "the need, and indeed the responsibility, of the Commission to reevaluate its regulatory standards over time." *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1425 (D.C. Cir. 1983) (footnote omitted). *See Black Citizens for a Fair Media v. FCC*, 719 F.2d 407, 411 (D.C. Cir. 1983). Cognizant of this responsibility, throughout its history, the Commission has periodically reevaluated the fairness doctrine. *1985 Fairness Report*, *supra* note 6; *1974 Fairness Report*, *supra* note 2; *Editorializing by Broadcast Licensees* in Docket No. 8516, 13 FCC 1246 (1949) (*1949 Fairness Report*). The *1985 Fairness Report* is both the most recent and the most comprehensive reassessment of the doctrine conducted by the agency.

[9] *See supra* note 6. The Court of Appeals characterized the conclusions reached by the Commission in the *1985 Fairness Report* as "carefully documented and reasoned . . . ." *Meredith v. FCC*, 809 F.2d at 867.

[10] *1985 Fairness Report*, 102 FCC 2d at 224.

Commission also determined that the fairness doctrine "chills" speech, finding that "in stark contravention of its purpose, [the doctrine] operates as a pervasive and significant impediment to the broadcasting of controversial issues of public importance."[11] In addition, the agency found that its enforcement of the doctrine acts to inhibit the expression of unpopular opinion;[12] it places the government in the intrusive role of scrutinizing program content;[13] it creates the opportunity for abuse for partisan political purposes;[14] and it imposes unnecessary costs upon both broadcasters and the Commission.[15]

5. While disclaiming any intention to "definitively resolve whether or not the fairness doctrine is constitutional,"[16] the Commission questioned whether the doctrine is consistent with the guarantees of the First Amendment. It stated that "were the balance ours alone to strike, the fairness doctrine would thus fall short of promoting those interests necessary to uphold its constitutionality."[17] The Commission recognized that the Supreme Court in 1969 had upheld the doctrine in *Red Lion Broadcasting Co. v. FCC* (*Red Lion*),[18] but determined that the factual predicates underlying that decision had been eroded.[19]

[11] *Id.* at 169.

[12] *Id.* at 188-90.

[13] *Id.* at 190-92.

[14] *Id.* at 192-94.

[15] *Id.* at 194-96.

[16] *Id.* at 155.

[17] *Id.* at 156.

[18] 395 U.S. 367 (1969). The *Red Lion* decision is discussed more fully *infra*, at 37-38.

[19] The Commission determined that the constitutionality of the fairness doctrine was suspect under the traditional constitutional standard of review governing broadcast regulation enunicated in *Red Lion*. The Commission explained:

(*footnote continued*)

6. In the *1985 Fairness Report*, the Commission did not reach a definitive conclusion as to whether the doctrine was codified.[20] In light of the "intense Congressional interest in the fairness doctrine . . . the pendency of legislative proposals,"[21] as well as the uncertainty as to whether the doctrine was in fact codified, the Commission concluded that "it would be inappropriate at this time . . . to either eliminate or significantly restrict the scope of the doctrine."[22] Expressing its intention to continue to enforce the fairness doctrine, the Commission forwarded its *Report* to Congress so that the legislature would have "an opportunity to review the fairness doctrine in light of the evidence [in that *Report*]."[23]

B. HISTORY OF THIS PROCEEDING

1. *Syracuse Peace Council v. Television Station WTVH*

7. While the general inquiry on the fairness doctrine was still pending before the agency, the Commission in this adju-

> [W]e believe that the fairness doctrine can no longer be justified on the grounds that it is necessary to promote the First Amendment rights of the listening and viewing public. Indeed, the chilling effect on the presentation of controversial issues of public importance resulting from our regulatory policies affirmatively disserves the interest of the public in obtaining access to diverse viewpoints. In addition, we believe that the fairness doctrine, as a regulation which directly affects the content of speech aired over broadcast frequencies, significantly impairs the journalistic freedom of broadcasters.

1985 Fairness Report, 102 FCC 2d at 156.

20 *Id.* at 245. In *TRAC v. FCC*, *supra* note 2—a case decided after the Commission issued the *1985 Fairness Report*—the United States Court of Appeals determined that the fairness doctrine was not codified in Section 315 of the Communications Act. *See* 47 U.S.C. 315 (1982). The Supreme Court recently denied the petitions for certiorari in that case, 55 U.S.L.W. 3821 (U.S.1987), and consequently the decision in *TRAC v. FCC* is final.

21 *1985 Fairness Report*, 102 FCC 2d at 247.

22 *Id.* at 148.

23 *Id.*

dication held that television station WTVH in Syracuse, New York, had violated the doctrine.[24] The Commission determined that WTVH, by broadcasting a series of editorial advertisements advocating the construction of the Nine Mile Point II nuclear plant as a sound investment for New York, presented a controversial issue of public importance. Finding at that time that the station had failed to air any contrasting viewpoints on the issue, the Commission concluded that WTVH had not met its obligations under the fairness doctrine.

8. The Meredith Corporation, the licensee of station WTVH, petitioned the Commission to reconsider its decision.[25] Addressing the agency's administration of the doctrine, Meredith argued that the Commission had misapplied administrative precedent and had erred in determining that the station violated the fairness doctrine. Specifically, Meredith contended that the Commission had erred in determining that the issue was controversial at the time that the advertisements were broadcast. It also argued that the agency had acted incorrectly in framing the controversial issue of public importance. In addition, it asserted that the agency had improperly distinguished an earlier administrative decision—*Yes to Stop Calloway Committee*[26]—which, in its view, was "controlling" in this case. Finally, providing new evidence of additional programming, Meredith asserted that it had in fact aired balanced programming on the issue involved in this case.

9. In a supplement attached to its Reply,[27] Meredith advanced a number of legal arguments asserting that the fair-

24 *Syracuse Peace Council v. Television Station WTVH*, *supra* note 3.

25 "Petition for Reconsideration," filed by Meredith Corp., *Syracuse Peace Council v. Television Station WTVH* (Jan. 22, 1985).

26 98 FCC 2d 1317 (1984).

27 "Reply to Opposition to Petition for Reconsideration and Supplement," filed by Meredith Corp., *Syracuse Peace Council v. Television Station WTVH* (filed Apr. 12, 1985) at 12-19 (Meredith Reply). That

ness doctrine, as applied to the specific facts of the case *sub judice* and on its face, was unconstitutional. First, it contended that the Commission, by failing to follow the appropriate procedures governing the administration of the doctrine, applied the fairness doctrine in a manner which violated its constitutional rights.[28] Second, proferring quantitative data relating to the availability of broadcast stations, cable systems and newer technologies in Syracuse, New York, Meredith asserted that the assumptions of scarcity underlying the *Red Lion* decision are not present in the specific market in which WTVH operates.[29] Thus, while noting that "there may exist situations today wherein sufficient media outlets do not exist to ensure a multiplicity of both voices and viewpoints,"[30] Meredith asserted that the number and types of information sources in Syracuse, New York, demonstrate that the fairness doctrine is not constitutionally permissible in that market.[31] Third, Meredith stated that "the application of the fairness doctrine to WTVH's editorial decision to air the commercials [in this case] has had a distinct and chilling effect on its freedom of speech."[32] Fourth, Meredith contended that there was sufficient evidence in the Commission's pending

document is attached to the "Comments of Meredith Corp." filed Feb. 25, 1987 in the instant proceeding.

28 Meredith's first constitutional argument does not question the constitutionality of the fairness doctrine on its face; rather, it is narrowly limited in scope to the effect of the doctrine as applied to the facts of this case. This argument apparently relies on the assertion that the agency improperly substituted its determination of the issue addressed in the editorial advertisements for that of the broadcast station instead of assessing whether Meredith had exercised its reasonable judgment in determining the issue addressed.

29 *Id.* at 26. *See infra* note 88.

30 *Id.* at 26-27.

31 *Id.* at 26-31.

32 *Id.* at 22. *See id.* at 31-33. Meredith stated that the Commission's decision in this case that WTVH violated the fairness doctrine would "work[ ] a degree of self-censorship alluded to in *Red Lion*." *Id.* at 33.

fairness doctrine inquiry[33] demonstrating that "the scarcity rationale of *Red Lion* no longer exists"[34] for the agency "to reach the conclusion that, as a general matter, the Fairness Doctrine contravenes the First Amendment rights of broadcasters."[35] Thus, apparently questioning the legal and factual basis upon which the constitutionality of the fairness doctrine was upheld in *Red Lion*, Meredith asserted that "the Fairness Doctrine as a whole lacks constitutional validity today."[36]

10. In a *Memorandum Opinion and Order*, the Commission denied Meredith's petition for reconsideration.[37] Addressing in detail the nonconstitutional contentions raised by Meredith,[38] the Commission concluded that it had correctly found on the basis of the evidence before it that WTVH had violated

33 *See Inquiry into the General Fairness Doctrine Obligations of Broadcast Licensees* in Gen. Docket No. 84-282, FCC 84-140 (released May 8, 1984), 48 Fed. Reg. 20,317 (May 14, 1984). The fairness inquiry was pending at the time that Meredith made this argument.

34 Meredith Reply, at 26 n.29.

35 *Id.* In addition, Meredith took the position that the interest of the public in obtaining access to diverse viewpoints can be achieved by less intrusive means than the fairness doctrine. *Id.* at 33-35.

36 *Id.* at 41. *See id.* at 19-26. Finally, Meredith argued that the fairness doctrine lacks the requisite specificity required by the due process clause of the Fifth Amendment and thus is unconstitutionally vague. *Id.* at 35-38. *See* U.S. CONST. amend. V. In light of our conclusion that the doctrine deprives broadcasters of their First Amendment rights, we have no need to resolve whether it also violates the due process clause of the Fifth Amendment.

37 *Reconsideration Order*, *supra* note 3, at 9.

38 For example, the Commission determined that it was unreasonable for station WTVH to have concluded that there was no ongoing controversy of public importance on whether the Nine Mile II plant was a sound investment at the time the editorial advertisements were broadcast. *Id.* at 10-16. The Commission rejected Meredith's contention that it had improperly reframed the issue identified by the complainant (*id.* at 16 n.9), and found Meredith's reliance upon the *Yes to Stop Calloway Committee*, 98 FCC 2d 1317 (1984), to have been misplaced. *Reconsideration Order*, *supra* note 3, at 17.

the fairness doctrine.[39] The agency, however, did not reach the merits of Meredith's constitutional arguments. Citing the *1985 Fairness Report*, it stated that it had determined to continue to enforce the doctrine "irrespective of [its] view concerning the constitutionality of the Fairness Doctrine, [because] the question of its repeal or its constitutionality is best left to Congress and the courts."[40]

2. *Meredith Corp. v. FCC*

11. Meredith sought judicial review of the Commission's order in the United States Court of Appeals for the District of Columbia Circuit.[41] The Court on review rejected Meredith's contention that the Commission had misconstrued administrative precedent[42] or erred in determining that WTVH's actions did not satisfy the requirements of the fairness doctrine.[43] It asserted, however, that the Commission had acted

39 The Commission determined, however, that subsequent to the date of its initial ruling, Meredith had provided information that WTVH had in fact broadcast opposing views on this issue. The Commission concluded that this information "demonstrate[d] the licensee's good faith in complying with the Fairness Doctrine and show[ed] its intention to do so in the future." *Reconsideration Order*, *supra* note 3, at 20.

40 *Id.* at 9 n.4.

41 "Petition for Review," filed by Meredith Corp. in *Meredith Corp. v. FCC*, No. 85-1723 (D.C. Cir., filed October 31, 1985).

42 *Meredith Corp. v. FCC*, 809 F.2d at 870-71. In its opinion, the Court stated that it had "no doubt the Commission's application of its fairness precedent must be sustained. The FCC's opinion thoroughly explained its conclusions and persuasively distinguished the cases cited by [Meredith]." *Id.* at 871.

43 Before reaching the merits of the case, the Court addressed two procedural matters. First, the Court held that Meredith had standing because the Commission had made a formal determination that WTVH had violated the fairness doctrine. *Id.* at 868-69. Second, the Court rejected the argument that Section 405 of the Communications Act, 47 U.S.C. 405 (1982), precluded it from considering the constitutional issues because Meredith had raised these arguments for the first time in a supplemental pleading filed after the deadline for petitions for reconsideration. *Meredith Corp. v. FCC*, 809 F.2d at 869-70.

improperly in holding that Meredith violated the doctrine without responding to the broadcaster's constitutional arguments.[44] While noting that "[a]n agency is not required to reconsider the merits of a rule each time it seeks to apply it,"[45] the court stated that the Commission, in its *1985 Fairness Report*:

> has already largely undermined the legitimacy of its own rule. The FCC has issued a formal report that eviscerates the rationale for its existing regulations. The agency has deliberately cast grave legal doubt on the fairness doctrine . . . [in] a formal fashion.[46]

44 *Id.* at 872-73. The Court stated that "in a formal adjudication, an administrative agency is obliged to consider and respond to substantial arguments a respondent presents in its defense." *Id.* at 873 (citations omitted).

45 *Id.*

46 *Id.* The Court of Appeals concluded that, on remand, *avoiding the constitutional issue in this case* "appears clearly no longer available" to the agency. *Meredith Corp. v. FCC*, 809 F.2d at 873 n.11. The Court pointed out that it had recently determined, in *TRAC v. FCC*, *supra* note 2, that the fairness doctrine was not codified. In addition, the Court discussed the fact that Congress, subsequent to *TRAC v. FCC*, had enacted appropriations legislation which referred explicitly to the fairness doctrine both in the body of that statute and in its legislative history. *Meredith Corp. v. FCC*, 809 F.2d at 873 n.11. *See* Making Continuing Appropriations for Fiscal Year 1987, *supra* note 4, and H.R. Rep. No. 99-1005, 99th Cong., 2d Sess. 70-71 (1986). The court asserted that the actual language of the appropriations legislation "does not appear to mandate the fairness doctrine." *Meredith Corp. v. FCC*, 809 F.2d at 873 n.11. The court probed counsel for the Commission, at oral argument, as to whether the Commission could be bound by legislative intent, as expressed in report language and other legislative history, but not in actual legislation. In its decision, the court noted that counsel admitted that legislative history was not legally binding. Despite the fact that the court had before it legislative history indicating that at least some members of Congress did not want the Commission to act on the fairness doctrine, *see id.*, the court nevertheless remanded the proceedings and directed the Commission to consider the constitutional and public interest challenges to the fairness doctrine, demonstrating its determination

12. In remanding the case to the Commission for further consideration of Meredith's constitutional claims,[47] the Court provided the Commission with several options. It indicated that the Commission could address the constitutional issue broadly or "choose to decide the issue narrowly, resting on the particular circumstances of Meredith's case."[48] As a further alternative, the Court stated that the Commission could determine, "in an adjudicatory context, that the doctrine cannot be enforced because it is contrary to the public interest and thereby avoid the constitutional issue."[49] In any event, the

that the various expressions of congressional intent did not codify the doctrine nor justify continued delay in resolving petitioner's claim.

Subsequent to the court's decision in *Meredith Corp. v. FCC*, efforts have been made to codify the fairness doctrine. S. 742, 100th Cong., 1st Sess. (1987); H.R. 1934 (1987). *See* S. Rep. 100-34, 100th Cong., 1st Sess. (1987); H.R. Rep. No. 100-108, 100th Cong. 1st Sess. (1987). S. 742 was passed by the Senate on April 21, 1987, and H.R. 1934 was passed by the House of Representatives on June 3, 1987. The legislation, however, was vetoed by the President on June 19, 1987, 23 Weekly Comp. Pres. Doc. 715 (June 29, 1987), and on June 23, 1987, the Senate voted to return the bill to committee without attempting to override the veto. 133 Cong. Rec. S8438 (daily ed. June 23, 1987). Thus, to date, these efforts have not resulted in codification, and thus the fairness doctrine is not mandated by statute. Hence, this case does not involve the authority of the Commission to question the constitutionality of a statute.

Nearly seven months have passed since the Court of Appeals decided *Meredith Corp. v. FCC*, and the Commission has had adequate time to assess comments and to analyze the constitutional and public interest challenges thoroughly. In light of these facts, and in light of the court's clear directions in remanding this case, we believe that we can no longer justifiably delay our response to WTVH's claims. Any further delay in deference to Congress' continuing interest in fairness legislation would be inconsistent with our adjudicatory responsibilities, *Meredith Corp. v. FCC*, 809 F.2d at 873-74, and proper administrative procedure, *see Koniag, Inc. v. Andrus*, 580 F.2d 601 (D.C. Cir. 1978); *Pillsbury v. FTC*, 354 F.2d 952 (5th Cir. 1966).

47 *Id.* at 874.

48 *Id.* at 872.

49 *Id.* at 872 n.10.

court admonished the members of this Commission that the failure to consider Meredith's constitutional arguments in its defense was not only the "very paradigm of arbitrary and capricious administrative action," but may also have constituted a breach of the oath that each Commissioner took to support and defend the Constitution.[50] This case was therefore remanded for rectification, and we now consider it, in light of that admonition.

3. Comments on Remand

13. In view of the importance and potentially far-ranging impact of our decision on remand, we invited interested persons, through publication of a notice in the Federal Register, to submit comments on "whether, in light of the 1985 Fairness Report, enforcement of the fairness doctrine is constitutional and whether enforcement of the doctrine is contrary to the public interest."[51] On remand, approximately fifty comments were filed by individuals, broadcasters, advertisers, public interest groups, trade associations, governmental entities and others.[52] The comments were approximately equally divided between those who support and those who oppose the fairness doctrine.[53]

50 *Id.* at 874.

51 *Order Requesting Comment*, *supra* note 5, at 2.

52 A list of the commenting parties is contained in Appendix A.

53 The American Civil Liberties Union (ACLU) and the Safe Energy Communication Council (SECC) each filed a motion requesting the Commission to accept their late-filed comments. "Motion for Leave to File Comments Out-of Time," filed by American Civil Liberties Union, *Syracuse Peace Council against Television Station WTVH* (Mar. 3, 1987); "Motion for Leave to Submit Late-Filed Comments," filed by Safe Energy Communication Council, *Syracuse Peace Council against Television Station WTVH* (Mar. 5, 1987). ACLU stated that it was unable to submit its comments in a timely manner because it was involved in other substantial litigation. SECC asserted that a substantial amount of its draft comments was lost due to a computer malfunction, thereby preventing it from filing its comments within the prescribed deadline. Because both the ACLU and the SECC have shown good cause for the

14. A number of fairness doctrine advocates argue that the Commission should not consider either the propriety or the constitutionality of the doctrine in this adjudication. For example, certain proponents, including the New York State Consumer Protection Board (New York) and the Office of the United Church of Christ *et al.* (UCC), argue that the agency lacks the authority to abolish the fairness doctrine in an adjudicatory proceeding because, in their view, it is an agency rule which cannot be altered except through notice and comment rulemaking procedures. The Syracuse Peace Council (SPC) contends that the agency, on remand, should find, as a factual matter, that Meredith Corporation did not violate the fairness doctrine, and thus the Commission could avoid resolution of any general policy or constitutional issues. In addition, certain commenters suggest alternative proceedings or approaches to the consideration of the issues on remand. For example, a number of parties request the Commission variously to institute a rulemaking on the fairness doctrine, to combine this adjudication with the proceeding addressing alternative enforcement policies for the fairness doctrine, or to defer consideration of this proceeding until after the alternatives proceeding is concluded or until the Supreme Court has disposed of the petitions for certiorari in *TRAC v. FCC*.[54]

15. If the agency decides the case on the merits, some fairness doctrine proponents state that the Commission should limit its consideration to the narrow facts presented in this adjudication. Arguing that the facts of this case are different from the typical fairness doctrine case because, *inter alia*, the controversial issue was presented in the context of an edito-

Commission to accept their late-filed comments, we shall grant their motions.

[54] The Democratic National Committee *et al.* (DNC) urge the Commission to defer resolution of the issues on remand until after the Supreme Court determines whether to grant certiorari in *TRAC v. FCC*. On June 8, 1987, the Supreme Court denied the petition for certiorari in *TRAC v. FCC*, and accordingly that request is now moot. *See* 55 U.S.L.W. 3821 (U.S. 1987).

rial advertisement, SPC and others contend that this adjudication is an inappropriate vehicle for the Commission to undertake a comprehensive evaluation of the doctrine on its face. In addition, a number of fairness doctrine proponents assert, as a general matter, that the doctrine is necessary to assure access by the public to diverse viewpoints on controversial issues. On the constitutional issue, they contend that because there are more persons who wish to broadcast than there are frequencies available, the "scarcity rationale" underlying the *Red Lion* decision still exists. Relying upon *Red Lion*, they argue that the fairness doctrine is constitutional.

16. In contrast, many parties opposing the fairness doctrine, including the American Advertising Federation, the National Broadcasting Co., Inc. (NBC), and the National Association of Broadcasters (NAB), urge the Commission, in this adjudication, to decide expeditiously whether the doctrine furthers the public interest and comports with the First Amendment. Relying upon the findings contained in the *1985 Fairness Report*, the American Association of Advertising Agencies, the Landmark Legal Foundation, the Freedom of Expression Foundation and others note that that there has been a substantial increase in the number and types of information services. They conclude that there is no scarcity of information sources justifying governmental intervention into the content of speech. NBC and others contend that fairness doctrine enforcement requires the government to make decisions concerning the content of programming that are fraught with judgmental uncertainty. Asserting that the effect of the doctrine is to inhibit the expression of views on controversial issues of public importance, a number of commenters state that there is no justification for the doctrine as a matter of policy. In addition, many commenters for the same reasons conclude that the doctrine violates the First Amendment rights of broadcasters. As a consequence, they state that it would be improper for the Commission to continue to enforce the doctrine and urge the agency to take whatever action is necessary to eliminate it.

III. DISCUSSION

A. SCOPE OF THIS PROCEEDING—PROCEDURAL ISSUES

1. Discussion of Policy and Constitutional Issues

17. SPC asserts that the Commission should avoid considering the policy or constitutional issues on remand entirely by resolving this case on the narrow factual issue concerning whether Meredith had violated the fairness doctrine.[55] Specifically, SPC urges us to grant Meredith's Petition for Reconsideration and to vacate our earlier decision upholding the validity of SPC's own complaint on the grounds Meredith had

[55] SPC notes that it had filed an objection to Meredith's Supplement in the reconsideration proceeding. It contends that the agency never considered its procedural objections to the acceptance of Meredith's Supplement in this adjudication. Renewing its request that the Commission strike Meredith's Supplement on procedural grounds, it asserts that the issue as to whether that document should be accepted "is again properly before the Commission." SPC Comments at 10. We disagree. In *Meredith Corp. v. FCC*, the court stated that:

> Clearly . . . the Commission had discretion to grant Meredith leave to present its constitutional argument. *And in its opinion on reconsideration, the Commission exercised that discretion, declining to bar Meredith's constitutional argument on procedural grounds—implicitly waiving the timeliness objection.*

809 F.2d at 869 (emphasis added). The court did not question the lawfulness of the agency's waiver. To the contrary, it held that the Commission erred in failing to address the constitutional issues raised by Meredith in its Supplement. An essential and necessary ingredient of this holding is that the arguments contained in the Supplement were properly before the agency. Contrary to SPC's suggestion, we are not free on remand to reconsider the propriety of this waiver. While SPC correctly notes that the court stated that "the Commission within its discretion *could have* denied Meredith leave to file because of procedural defects" (SPC Comments at 12, quoting *Meredith Corp. v. FCC*, 809 F.2d at 869 n.6 (emphasis added)), it fails to recognize that the Commission on reconsideration declined to exercise this discretion. We do not believe that there is anything in the court's statement to suggest that the court intended to permit the agency to revisit this issue on remand. In any event, if we were free to consider this issue, we would find that good cause exists to exercise our discretion to accept Meredith's Supplement.

in fact complied with the fairness doctrine by providing responsive programming.[56]

18. We reject SPC's request. The argument that Meredith had in fact satisfied its fairness doctrine obligations by presenting both sides of the controversial issue in question was presented to the court in *Meredith Corp. v. FCC*. Nonetheless, the court expressly affirmed our earlier finding that station WTVH had violated the doctrine.[57] The affirmance of this aspect of the case is final, and we have no power to revisit this determination. It is well-established that:

> [t]he decision of a federal appellate court establishes the law binding further action in the litigation by another body subject to its authority. The latter 'is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of [the] court deciding the case. . . .'[58]

[56] The Court of Appeals, in *Meredith Corp. v. FCC*, held that we erred by failing to consider the constitutional issues raised by Meredith. By arguing that we should avoid consideration of the constitutional issues on remand, SPC, in essence, is asking us to make the same mistake again.

[57] The court specified that "the Commission's application of fairness doctrine precedent must be sustained." *Meredith Corp. v. FCC*, 809 F.2d at 871. SPC, as intervenor in *Meredith Corp. v. FCC*, at that time took the position, in contrast to that which it now takes, that "the FCC correctly applied the fairness doctrine precedent to the facts of this case." Brief of Intervenor Syracuse Peace Council, *Meredith Corp. v. FCC*, (D.C. Cir. No. 85-1723) at 28 (filed Aug. 19, 1986).

[58] *City of Cleveland, Ohio v. FPC*, 561 F.2d 344, 346 (D.C. Cir. 1977), quoting *Yablonski v. United Mine Workers*, 454 F.2d 1036, 1038-39 (D.C. Cir. 1971). *See Louisiana Land and Exploration Co. v. FERC*, 788 F.2d 1132, 1137 (5th Cir. 1986) *See generally Consumers Union of United States, Inc. v. FTC*, 801 F.2d 417, 421-22 (D.C. Cir. 1986) (Scalia, J.). "The basic doctrine that, until reversed the dictates of a Court of Appeals must be adhered to by those subject to the appellate court's jurisdiction applies . . . [to the] rule respecting the law of the case. Administrative agencies are no more free to ignore this doctrine than are district courts." *Beverly Enterprises, Inc. v. NLRB*, 727 F.2d 591, 594 (6th Cir. 1984) (citations omitted).

"The prior appellate review and determination of [a fairness doctrine violation] . . . foreclose the opportunity to redetermine th[at] issue [ ]."[59] SPC would have the Commission on remand revisit issues definitively decided by the Court of Appeals for the apparent purpose of avoiding the policy and constitutional issues which the court specifically directed us to consider. Such an approach would contravene the court's decision in *Meredith Corp. v. FCC*, and we decline to adopt it.[60]

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59 *Stewart Warner Corp. v. City of Potomac, Michigan*, 767 F.2d 1563, 1568 (Fed. Cir. 1985).

60 Arguing that the issues in this adjudication and those in the alternatives proceeding (*see supra* note 4) are interrelated, the DNC urges the Commission to consolidate this proceeding with the proceeding addressing fairness doctrine alternatives. It states further that it:

> continue[s] to believe that no modification of the Fairness Doctrine is necessary on either policy or constitutional grounds. If the Commission is committed to proceeding, however, the only viable approach would be for it to make a good-faith effort to explicitly formulate, consider and act upon alternative proposals by expeditiously issuing a Notice of Proposed Rulemaking proposing the adoption of specific alternatives, while simultaneously suspending activities in the *Meredith* docket.

DNC Comments at 6. We will not adopt DNC's proposal. In *Meredith Corp. v. FCC*, 809 F.2d at 873 n.11, the court expressly recognized that the agency was under a legislative mandate to consider alternative means of administration and enforcement of the doctrine, but did not suggest that the two proceedings were inextricably interrelated. Nor did the court intimate that the agency should suspend consideration of the issues on remand pending completion of the alternatives proceeding. We note, however, that former Chairman Fowler did tell members of Congress that we would not decide this case on remand before concluding the alternatives report. Rather, he told them, we would decide this case at either the same meeting that we adopt the alternatives report or at a subsequent meeting. *Departments of State, Justice, Commerce, the Judiciary, and Related Agencies for Fiscal Year 1988 Budget Estimates: Hearings Before a Subcomm. of the Senate Comm. on Appropriations*, 100th Cong., 1st Sess. (Feb. 18, 1987) (testimony of Chairman Fowler); *see also Departments of Commerce, Justice, and State, the Judiciary,*

19. Therefore, in this *Memorandum Opinion and Order*,[61] we consider whether the fairness doctrine is consistent with

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and Related Agencies Appropriations for 1988: Hearings Before a Subcomm. of the House Comm. on Appropriations, 100th Cong., 1st Sess. 642 (1987) (testimony of Chairman Fowler). As noted above, *supra* note 4, we have complied with that representation by today adopting and submitting the report requested by Congress. We have concluded in that report that it would not further the public interest to institute a rulemaking to consider the promulgation of agency rules on fairness doctrine alternatives. As a consequence, we do not believe that a suspension of this proceeding is warranted. *See infra* note 87. Furthermore, we note that the only issue before us in *this* proceeding is the continued viability of the fairness doctrine *as it is currently administered*. Consideration of this issue does not necessitate any additional evaluation of alternative policies.

61 Certain parties argue that the Commission lacks authority to conduct this proceeding because the Court of Appeals, in *Meredith Corp. v. FCC*, had not formally issued the mandate remanding the case to the Commission at the time the Commission invited comments on this proceeding. *E.g.*, "Comments of Syracuse Peace Council," filed Feb. 25, 1987, at 3-4 (SPC Comments); "Comments of Democratic National Committee *et al.*," filed Feb. 25, 1987, at 2 (DNC Comments).

We reject this technical argument. The courts have long recognized that the "concept of an indivisible jurisdiction which must be all in one tribunal or all in the other may fit other statutory schemes, but not that of the Communications Act." *Wrather-Alverez Broadcasting v. FCC*, 248 F.2d 646, 649 (D.C. Cir. 1957). *See* 47 U.S.C. 405 (1982); *see also United States v. Benmar Transport & Leasing Corp.*, 444 U.S. 4 (1957); *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 541 (1970). Indeed, it is not uncommon for both the Commission and the appellate courts concurrently to exercise jurisdiction over the same proceeding. In *Containerfreight Corp. v. United States*, 752 F.2d 419 (9th Cir. 1985), the court rejected an allegation, similar to the one presented in this proceeding, that the Interstate Commerce Commission had improperly reopened a proceeding prior to the issuance of a judicial mandate. Stating that its remand decision "plainly invited the Commission to solicit additional evidence," the court held that the remand proceedings had been "lawfully conducted." *Id.* at 427. The court pointed out that the Commission's action was "simply to get on with the business of complying" with the court's remand decision. *Id.* Similarly, the *Order Requesting Comments*, "far from being inconsistent with [the Court's] decision in [*Meredith Corp. v. FCC*], was invited by it." *Id.* Similarly, in this case, the only action taken by the Commission

the guarantees of the First Amendment and whether it comports with the public interest. As noted above, the court ordered the Commission to consider Meredith's constitutional arguments unless it decided, on policy grounds, not to enforce the fairness doctrine. As we began to examine the policy issues, however, it became evident to us that the policy and constitutional considerations in this matter are inextricably intertwined and that it would be difficult, if not impossible, to isolate the policy considerations from the constitutional aspects underlying the doctrine.[62] We believe, as a result, that

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before the mandate issued was to invite comments, which was completely consistent with the court's instructions. Further, in subsequent pleadings filed with the court, we informed the court of our *Order Requesting Comments*, "Opposition to Motion for Stay of Mandate," filed by Federal Communications Comm'n, No. 85-1723 (Feb. 17, 1987), at 2 n.2, and, having received no indication to the contrary, we have no basis to conclude that our *Order Requesting Comments* was inappropriately issued.

In any event, on April 10, 1987, the Court of Appeals issued its mandate. As a consequence, the contentions that the Commission lacks jurisdiction to issue any substantive orders prior to the issuance of the mandate are moot.

[62] Our decision to analyze the constitutional and policy issues separately in the *1985 Fairness Report* was out of an abundance of caution not to overstep our appropriate role in this matter. At that time, the uncertainty as to the fairness doctrine's codification, together with Congress' intense interest in the issue, led us to question the propriety of reaching a conclusion on the constitutionality of the doctrine. *See 1985 Fairness Report*, 102 FCC 2d at 155-56. Furthermore, as noted earlier in this proceeding, we believed that the resolution of the constitutional issues was better left to Congress and the courts. *See Reconsideration Order*, *supra* note 3, at 5 n.4. Consequently, our analysis in the *1985 Fairness Report* focused on a policy perspective so as not to run afoul of these concerns. We believe, however, as we reiterate today, that our analysis of the fairness doctrine in 1985 was in fact informed and driven by First Amendment principles, and with the uncertainty of the doctrine's codification removed, *TRAC v. FCC*, *supra* note 2, and the *Meredith* court's directive to consider the constitutional issues, *Meredith Corp. v. FCC*, *supra* note 1, we believe that it is now incumbent upon us to consider the doctrine in terms of the inextricable constitutional issues on which the policy rests.

it is appropriate and necessary to address the policy and constitutional issues together for a number of reasons.[63]

20. First, in an analysis of any Commission regulation, it is well-established that First Amendment considerations are an integral component of the public interest standard. For example, in *FCC v. National Citizens Committee for Broadcasting*,[64] the Supreme Court stated that

> the " 'public interest' standard necessarily invites reference to First Amendment principles,' " *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 122 (1973), and, in particular, to the First Amendment goal of achieving "the widest possible dissemination of information from diverse and antagonistic sources," *Associated Press v. United States*, 326 U.S. 1, 20 (1945).[65]

A meaningful assessment of the propriety of the doctrine, therefore, necessarily includes an evaluation of its constitutionality. If the doctrine impedes the realization of First Amendment objectives—and, as explained more fully

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[63] Certain parties have continued to argue that the Commission lacks jurisdiction to consider the policy or constitutional implications of the fairness doctrine on the grounds that the doctrine is mandated by statute. As noted *supra*, at note 46, the court in *Meredith Corp. v. FCC*, expressly stated that the Commission could not determine, on remand, that the fairness doctrine is statutory. Indeed, the court pointed out that the argument that the doctrine had been codified by Section 315 of the Communications Act had already been rejected by the court in *TRAC v. FCC*, *supra* note 2. Therefore, in conformance with the court's express directive in *Meredith v. FCC*, we shall not consider the arguments raised by the comments that the doctrine is statutory and, consequently, that the agency lacks jurisdiction to question either its propriety or its constitutionality.

[64] 436 U.S. 775 (1978).

[65] 436 U.S. at 775. *See also American Security Council Education Foundation v. FCC*, 607 F.2d 438, 443 n.12 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980).

below, we believe that it does—*a fortiori* it disserves the public interest.

21. A second, but related, reason that the policy and constitutional issues are inextricably intertwined is that the promotion of First Amendment values was the Commission's core policy objective in establishing and maintaining the doctrine.[66] The parameters defining the need and desirability of government intervention under the fairness doctrine are coextensive with those of the First Amendment. Therefore, if the doctrine fails to further First Amendment principles, or if it strays from those parameters established by the Constitution, it necessarily follows that the doctrine does not achieve the specific purpose for which it was intended and can no longer be sustained.[67]

22. Third, this Commission was established by Congress as the expert agency in broadcast matters and possesses more than fifty years of experience with the day-to-day implementation of communications regulation. As a consequence, the courts, when considering the constitutionality of broadcast regulation, have found our perspective informative. For example, the Supreme Court has stated that "in evaluating . . . First Amendment claims . . . we must afford great weight to the decisions of Congress and the experience of the Com-

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66 In our *1974 Fairness Report*, we asserted that there was a symmetry of purpose between the fairness doctrine and the First Amendment:

> The purpose and foundation of the fairness doctrine is . . . that of the First Amendment itself: "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. . . ."

48 FCC 2d at 6, quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 390. *See also 1949 Fairness Report*, 13 FCC at 262-63.

67 Conversely, as we noted in the *1985 Fairness Report*, "the same factors which demonstrate that the fairness doctrine is no longer appropriate as a matter of policy also suggest that the doctrine may no longer be permissible as a matter of constitutional law." 102 FCC 2d at 147-48.

mission . . . ."[68] Further, the Court of Appeals, in remanding this case to the Commission, affirmatively stated that it "may well benefit—in the event of further review—from the Commission's analysis [of the constitutional issue]."[69] Accordingly, we consider the constitutional and policy issues raised in this proceeding as being derived from the same set of principles.

23. We reject the contention of those parties who argue that we cannot address the broad policy and constitutional issues involving the fairness doctrine in this proceeding, but must issue an additional rulemaking notice to do so.[70] In *Meredith Corp. v. FCC*, the Court explicitly stated that the Commission could decide this case on broad policy and constitutional grounds.[71] The contention, then, that the Commission lacks authority to consider these issues in this adjudication is directly at odds with the directive of the Court of Appeals in remanding this case to the agency.

24. It is well-established, moreover, that "administrative agencies have wide leeway in choosing to announce rules and intepretations in the course of adjudications."[72] The courts

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68 *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 102. *See FCC v. League of Women Voters of California*, 468 U.S. 364, 376 n.11 (1984).

69 *Meredith Corp. v. FCC*, 809 F.2d at 872.

70 *E.g.*, "Comments of Office of Communication of the United Church of Christ, Communication Commission, National Council of Churches, Henry Geller and Donna Lampert" at 2-4 (Feb. 12, 1987) (UCC Comments); "Comments of the New York State Consumer Protection Board" at 2-4 (Feb. 24, 1987) (New York Comments); "Comments of the American Civil Liberties Union" at 2 n.1 (March 2, 1987) (ACLU Comments).

71 *Meredith Corp. v. FCC*, 809 F.2d at 872.

72 *International Union, United Automobile, Aereospace & Agricultural Implement Workers of America v. Brock*, 783 F.2d 237, 246 (D.C. Cir.1986). Indeed, the Supreme Court has stated that an administrative agency "is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and

have duly recognized that "the choice whether to proceed by rulemaking or adjudication is primarily one for the agency regardless of whether the decision may affect agency policy and have general prospective application."[73] While acknowledging this long established rule of administrative law,[74] certain parties nonetheless contend that the Commission's discretion in selecting the type of proceeding in which to consider its policies would be abused were the Commission to address the broad constitutional and policy issues in this adjudication.[75] We disagree. Even if this case only involved a situation in which the agency decided on its own motion to reevaluate in an adjudication the propriety and the constitutionality of the fairness doctrine, this course of action would be lawful. The courts permit the Commission to reassess administrative precedent in adjudications even where the regulatory policy is of long standing and has far reaching

adjudication lies in the first instance within the [agency's] discretion." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). *See SEC v. Chenery*, 332 U.S. 194, 203 (1947), quoting Columbia Broadcasting System v. United States, 316 U.S. 407, 421 (1942) (And the choice made between proceeding by general rule or by individual *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.).

73 *Chisholm v. FCC*, 538 F.2d 349, 365 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976) (FCC had discretion in reversing an administrative interpretation involving the "equal time" provisions of Section 315 of the Communications Act by adjudication).

74 *See, e.g.*, ACLU Comments at 2, n.1.; SPC Comments at 17-18.

75 Because this adjudication does not involve certain issues which are present in some fairness doctrine cases, *e.g.*, noncommercial programming, the first prong of the doctrine, ballot questions, election-related issues, the political editorial rules or the personal attack rules, SPC contends that it would be an abuse of our discretion to address the general policy and constitutional issues in this adjudication. *See* SPC Comments at 17. To the extent that SPC challenges our ability to review the parent fairness doctrine in this adjudication involving its application in a particular context, we do not accept this argument. *See supra* 27-35. Because this decision will serve as precedent in future cases, we need not—and do not—decide here what effect today's ruling will have on every conceivable application of the fairness doctrine.

effect.[76] In any event, the agency reopened this proceeding pursuant to an express judicial directive to consider the lawfulness of enforcing the fairness doctrine against station WTVH, provided explicit notice of the matters at issue, and solicited comment from all interested parties. It can hardly be an abuse of discretion for an agency to comply with an order of the Court of Appeals by addressing on remand the precise issues contemplated by that court.

25. We also reject the contention that we are barred from considering the propriety of the fairness doctrine because it is an agency rule which can not be modified or eliminated except through the notice and comment procedures prescribed in Section 4 of the Administrative Procedure Act (APA).[77] The fairness doctrine was never promulgated as an agency regulation pursuant to a notice and comment rulemaking process. Rather, it was developed over a period of time[78] through statements of policy (without notice and comment) and case-by-case adjudications. The first fairness doctrine obligations were imposed by the FCC and its predecessor, the Federal Radio Commission, in early adjudicatory proceedings.[79] The policy was clarified and further developed in subsequent adjudications and in reports issued by the Commission in 1949 and 1974.[80] The fairness doctrine was established, with-

76 *Chisholm v. FCC*, 538 F.2d at 364-65.

77 5 U.S.C. 553 (1982).

78 As we stated in the *1985 Fairness Report*, "the genesis of the fairness doctrine reveals an evolutionary process, spanning over a considerable period of time." *1985 Fairness Report*, 102 FCC 2d at 146.

79 *E.g.*, *Great Lakes Broadcasting Co.*, 3 FRC 32 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. dismissed*, 281 U.S. 706 (1930); *Young People's Association for the Propagation of the Gospel*, 6 FCC 178 (1938); *Mayflower Broadcasting Corp.*, 8 FCC 333 (1941).

80 *1949 Fairness Report*, *supra* note 8; *1974 Fairness Report*, *supra* note 2. For a history of the fairness doctrine, *see Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees* in Gen. Docket No. 84-282 (*Notice of Inquiry*), FCC 84-282 (released May 8, 1984); 49 Fed. Reg. 20,317 (May 14, 1984) at 9-24.

out notice and comment, and there is no requirement that it now be modified or eliminated through notice and comment rulemaking.[81]

26. Contrary to the contentions of parties such as the Office of Communications of the United Church of Christ, the fact that the fairness doctrine is referred to in Section 73.1910 of our rules[82] does not mean that it can be altered or eliminated only by means of a notice and comment rulemaking. The ref-

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81 We note, however, that, in any event, we opened the record in this very proceeding to accept comments from interested persons (whether or not parties to the proceeding) as to the appropriate course of action for us to take following the *Meredith Corp. v. FCC* decision. *Order Requesting Comment*, *supra* note 5. We believe that, in light of the *Order Requesting Comment*, the *1985 Fairness Report* (the culmination of a proceeding in which interested persons had ample opportunity to participate, *see supra* 3), and the *Meredith* case itself, interested persons had adequate notice and opportunity to comment on a proceeding that would obviously consider, and possibly rule on, the constitutionality of the fairness doctrine even if notice and comment were required. Indeed, a substantial number of commenters in this proceeding addressed the constitutional issues raised by this case. We see little difference between a Section 553 notice and comment rulemaking and the procedures followed in this adjudication. Therefore, even were notice and comment rulemaking procedures prescribed by the APA, this proceeding is comparable to the situation in *Chisholm v. FCC*, in which the Court of Appeals stated that it:

> see[s] no advantage to be gained in this instance by requiring the Commission to proceed via the formalities of rulemaking rather than through adjudication. Petitioners . . . all submitted lengthy comments to the Commission . . . . [T]he issues were fully aired before the Commission, which had the benefit of all arguments raised before this court. It is therefore difficult to see how requiring the Commission to go through the motions of notice and comment rulemaking at this point would in any way improve the quality of the information available to the Commission or change its decision. The only result would be delay while the Commission accomplished the same objective under a different label. Such empty formality is not required where the record demonstrates that the agency in fact has had the benefit of petitioners' comments. § 538 F.2d at 365.

82 47 C.F.R. 73.1910 (1986).

erence to the fairness doctrine was incorporated in the Code of Federal Regulations in 1978.[83] The Commission, without extensive analysis, had concluded at that time that the doctrine was codified by Section 315 of the Communications Act. Section 73.1910, which was adopted without notice and comment as part of an omnibus procedural restructuring of the broadcast rules, is a simple statement setting forth what the Commission erroneously perceived to be required by Section 315.[84] Specifically, in adopting Section 73.1910, the Commission stated that:

> The new rule simply states that the Fairness Doctrine is in Section 315(a) of the Communications Act, directs the rule user to the FCC public notice, "Fairness Doctrine and the Public Interest Standard," . . . and includes information on obtaining copies of this document from the FCC.[85]

Its adoption did not effectuate any change in broadcasters' obligations under the fairness doctrine. The Court of Appeals decision in *TRAC v. FCC* that the fairness doctrine is not codified in Section 315 renders Section 73.1910 of our rules meaningless, and it consequently has no relevance to the issues addressed in this proceeding.

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83 *Reregulation of Radio and Television Broadcasting*, FCC 78-681 (released Oct. 16, 1978), 43 Fed. Reg. 45,842 (Oct. 4, 1978).

84 In its entirely, Section 73.1910 states that:

> The Fairness Doctrine is contained in section 315 of the Communications Act of 1934, as amended, which provides that broadcasters have certain obligations to afford reasonable opportunity for the discussion of conflicting views on issues of public importance. *See* FCC public notice "Fairness Doctrine and the Public Interest Standards," 39 FR 26372. Copies may be obtained from the FCC upon request. § 47 C.F.R. 73.1910 (1986).

85 *Reregulation of Radio and Television Broadcasting*, 43 Fed. Reg. at 45,843.

2. Consideration of the Doctrine on its Face

27. After reviewing Meredith's several arguments in its defense,[86] we are persuaded by its argument that the fairness doctrine is unconstitutional on its face. We, therefore, do not—and, as explained below, cannot—confine our determination of the issues involved here to the specific facts of this adjudication. We do not believe that the constitutionality or the propriety of our holding that WTVH violated the fairness doctrine turns narrowly upon either the specific manner in which we have enforced the doctrine in this instance[87] or upon

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86 *See supra* 9.

87 Although Meredith challenged the constitutionality of the doctrine on its face, it alternatively asserted that the method in which we administered the doctrine in this case was unconstitutional. *See supra* 9. For two reasons, the constitutional determination herein shall not rest upon a narrow, "as applied" basis. First, Meredith's argument is premised upon the alleged failure of the Commission to follow the established procedures governing the enforcement of the fairness doctrine. Both the Commission on reconsideration and the Court of Appeals on review have already squarely rejected that argument. Second, we believe that the infringement on broadcasters' constitutional rights resulting from the application of the doctrine cannot be cured simply by a purportedly less intrusive enforcement mechanism. As we stated in the *1985 Fairness Report*:

> [W]e have enforced the doctrine with a view toward minimizing editorial intrusion on broadcast journalists. But the record in this proceeding has convinced us that the fairness doctrine generally operates to inhibit the presentation of controversial issues of public importance on the airwaves. Because the inhibiting effect is an inevitable result of the substantive rule itself, even carefully crafted implementing mechanisms have not been successful in preventing the fairness doctrine from operating to deter broadcasters from airing important and controversial issues.

102 FCC 2d at 184 (footnote omitted). In the *Fairness Alternatives Report*, *supra* note 4, we evaluated a number of proposals concerning alternative means of enforcing the fairness doctrine. In that *Report*, we reaffirmed our earlier determination that less intrusive enforcement of the existing fairness doctrine would not eliminate the "chilling effect" of the fairness doctrine, but determined that certain alternatives to the

any unique circumstances in the particular geographic market in which we have applied it.[88] Rather, we believe, as more fully discussed below, that the doctrine's infirmity of impermissibly chilling and reducing the discussion of controversial issues of public importance is not an infirmity resulting from the enforcement of the doctrine in this particular case or in particular markets, but is an infirmity that goes to the very heart of the enforcement of the fairness doctrine as a general matter. We believe that the relevant issue in this proceeding is whether the doctrine itself complies with the strictures of the First Amendment and thereby comports with sound public policy. Therefore, in order to resolve the issues that the Court directed us to consider, we conclude that we have no choice but to consider Meredith's challenge to the facial validity of the fairness doctrine itself.[89]

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fairness doctrine were nevertheless preferable to the existing doctrine. *See supra* note 60.

88 In its Reply, Meredith described the multiplicity of information sources available to listeners and viewers in Syracuse, New York. Although we believe, as discussed below, that the explosive growth in the number and types of information sources available to the public in the years since the Supreme Court's decision in *Red Lion* reinforces that the doctrine is unconstitutional, *see infra* 55-57, we believe that this is a factor, present in all markets, that makes the doctrine unconstitutional as a general matter. Further, neither this growth nor the actual number and types of information sources themselves have a bearing on the unconstitutional chilling effect that we have identified from the enforcement of the doctrine. Our concern for this chilling effect crosses all geographic and economic markets—from the largest to the smallest. Indeed, our concern is especially compelling in the smaller markets, where a chill would seriously deprive the public in those markets of access to robust, uninhibited debates on issues of public importance. The fact that the fairness doctrine is unconstitutional because it chills speech cannot change based on the size of the market in which the chill occurs. Therefore, we see no reason to limit our decision to the enforcement of the fairness doctrine in particular markets.

89 In remanding the case to the Commission for consideration of the constitutional issue, the court, in *Meredith Corp. v. FCC*, had left it to the Commission to determine whether the constitutional issue could be dealt with "narrowly, resting on the particular circumstances of Meredith's case," or whether it ought to be dealt with "more broadly." 809 F.2d at 872.

28. We also believe that there are cogent reasons why we must consider the broad policy and constitutional issues in this adjudication.[90] The particular broadcast at issue in this adjudication involved the broadcast of an editorial advertisement,[91] which triggered our enforcement of the fairness doctrine as expressed more particularly through the *Cullman* doctrine.[92] Although, at first blush, it appears that our decision could be limited to such announcements and to the continued vitality of the *Cullman* doctrine, closer scrutiny reveals that the policies involved cannot be segregated on any principled basis, so that such an approach is untenable.

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90 As the Court in *Meredith Corp. v. FCC* noted, the *1985 Fairness Report* casts doubt upon the continued lawfulness of the fairness doctrine. 809 F.2d at 873. By resolving the issues in this proceeding broadly, we will remove the uncertainty that currently exists concerning the propriety and the constitutionality of the doctrine.

91 The purpose of editorial advertising—like the advertisement in *New York Times v. Sullivan*, 376 U.S. 476 (1957)—is to disseminate opinions on important public issues rather than to carry out commercial transactions. Therefore, in its objective, editorial advertising is identical to the other types of broadcast speech on important, controversial issues that implicate the fairness doctrine. It is, in essence, political speech and not merely commercial speech, thereby deserving of the protections accorded to the former and not the latter category of speech under the First Amendment. *Compare id.*; *Consolidated Edison v. Public Service Comm'n*, 447 U.S. 530 (1980) (political speech); *with Central Hudson Gas v. Public Service Comm'n*, 447 U.S. 557 (1980) (commercial speech); *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976) (commercial speech).

We note that the type of editorial advertisement at issue in this and other *Cullman* doctrine proceedings should be distinguished from paid political advertisements, the broadcast of which would constitute a "use" within the meaning of 47 U.S.C. §§ 312(a)(7) and 315 and thereby trigger the particular obligations enumerated in the statute. Our decision herein focuses only on the group of obligations that comprise the fairness doctrine, which are separate and distinct from the obligations imposed by 47 U.S.C. §§ 312(a)(7) & 315. The latter obligations are thus not at issue in this proceeding.

92 *Cullman Broadcasting Co.*, 25 RR 895 (1963).

29. The *Cullman* doctrine developed from a particular application of the fairness doctrine in *Cullman Broadcasting Co.*[93] The *Cullman* case clarified that the fairness doctrine applies to a broadcaster's airing of an editorial advertisement that presents for the first time one side of a controversial issue of public importance, thereby requiring the broadcaster to afford a reasonable presentation of contrasting viewpoints on that issue. Under the *Cullman* doctrine, if a broadcaster does not intend to present contrasting viewpoints through its own programming and cannot obtain paid sponsorship for the presentation of such viewpoints, then it cannot refuse to broadcast a presentation of those viewpoints (otherwise suitable to the licensee) on the ground that it cannot obtain paid sponsorship for that presentation.[94] The *Cullman* doctrine is, in reality, no more than a statement that the fairness doctrine must be complied with regardless of the availability of paying program sponsors,[95] and, as explained more fully below,

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93 25 RR 895 (1963).

94 *Id.* at 897.

95 Indeed, in the *Cullman* case itself, the Commission considered its holding to be an application of the fairness doctrine when it said: "We hope that the views set forth above will be helpful in determining the requirements of the 'fairness doctrine' with respect to controversial issues such as this one." *Id.* at 897. We also note that, in the *Red Lion* decision, the Supreme Court cited to the *Cullman* doctrine as only one element of a collection of principles that comprise the fairness doctrine. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 377-78.

The *Cullman* doctrine has been criticized on the grounds that it requires broadcasters to present balanced *programming* as a result of issues and viewpoints presented through *advertisements*. Such advertisements, according to critics, are not properly considered part of broadcasters' programming, since they are prepared by individual private interests and are not the product of broadcasters' editorial discretion. Additionally, critics argue that broadcasters should be held responsible under the fairness doctrine only for the programming that they produce. Although these arguments identify problems associated with the enforcement of the *Cullman* doctrine, they do not serve to distinguish the *Cullman* doctrine from the fairness doctrine. Rather, *Cullman* is consistent with the fairness doctrine's focus on broadcasters' *overall* programming and the exercise of their discretion in accepting editorial advertisements

its infirmity stems from the very heart of the fairness doctrine—*i.e.*, its threat of government intrusion into the editorial process to ensure that broadcasters provide balanced programming in connection with their airing of editorial advertisements inhibits broadcasters from accepting such advertisements.[96] Thus, the *Cullman* doctrine can neither be logically nor materially distinguished from the core of the fairness doctrine itself.

30. For example, the fact that the *Cullman* doctrine requires the broadcaster to broadcast unsponsored presentations of contrasting viewpoints if it cannot obtain sponsored presentations of such viewpoints does not distinguish it from its parent fairness doctrine. The presentation of one side of any controversial issue of public importance is generally financed either directly by the actual speaker, through an editorial advertisement (a *Cullman* scenario), or by the broadcaster, through the station's commercial advertisement revenues (a general fairness scenario). If the broadcaster cannot obtain financing for the presentation of contrasting viewpoints on a particular issue from the sale of another editorial advertisement to another speaker, then the broadcaster must finance the presentation of such viewpoints using its own commercial advertisement revenues. In either event, the regulatory and economic burdens on the broadcaster are the same; and nothing distinguishes the *Cullman* doctrine from the fairness doctrine in this context.[97]

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as part of their overall programming. As such, it is properly viewed as the product of the fairness doctrine itself.

96 *See infra* 48.

97 We note that the enforcement of the *Cullman* doctrine, in practice, results in the misimpression by many broadcasters that the doctrine requires them to counter paid editorial advertisements with unpaid advertisements if they are unable to obtain paid advertisements to present opposing viewpoints. Although the doctrine only requires broadcasters to present such viewpoints in their overall programming, many broadcasters may believe that it is easier to defend themselves against potential fairness doctrine complaints by demonstrating that they presented opposing viewpoints through other editorial advertisements.

(*footnote continued*)

31. Finally, *Cullman* obligations arise, just as general fairness obligations arise, only when the editorial advertisement involves a controversial issue of public importance. Hence, just like other programming that does not involve such issues, an editorial advertisement that does not involve a controversial issue of public importance does not give rise to any obligation to present contrasting viewpoints. Consequently, it becomes clear that the *Cullman* doctrine derives its life blood from the fairness doctrine, and its continued vitality cannot be considered without a concomitant assessment of the underlying fairness doctrine. Therefore, we believe that, because the constitutional and public interest infirmity of the *Cullman* doctrine derives from the underlying fairness doctrine, it would be arbitrary and capricious for us to consider the *Cullman* doctrine in this proceeding, without also addressing the fairness doctrine that stands as its base.

32. In short, broadcasters are faced daily with editorial decisions concerning what types of commercial or noncommercial material on controversial public issues to present to their listeners and viewers. The fundamental issue embodied in this fairness doctrine litigation is the same as that pre-

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Indeed, the record developed in the *1985 Fairness Report* indicates that, in some instances, the advocates of those opposing viewpoints perpetuate this misimpression by insisting that broadcasters air opposing viewpoints through such advertisements, threatening to complain to the Commission if broadcasters fail to do so. *See 1985 Fairness Report*, 102 FCC 2d at 174-78 (specifically citing the effect of the *Cullman* doctrine on the coverage of such public issues as beverage deposit legislation and smoking legislation).

In other contexts, the Supreme Court has specifically rejected as contrary to the First Amendment the proposition that government may regulate speech for the purpose of equalizing the voices of those with differing financial resources. *Buckley v. Valeo*, 424 U.S. 1, 49 (1974). This, however, has been the practical effect of the policy here in question, as is well illustrated by the facts of this case. To respond to the *paid* spot advertisements of the Energy Association of New York, WTVH provided the Environmental Defense Fund and the Syracuse Peace Council with 103 *free* spots to provide contrasting views. *Reconsideration Order*, *supra* note 3, at 19.

sented in all other fairness doctrine cases: whether it is constitutional and thereby sound public policy for a government agency to oversee editorial decisions of broadcast journalists concerning the broadcast of controversial issues of public importance. Because the case before us is a product of the fairness doctrine itself, and because it raises important policy and constitutional issues common to all fairness doctrine litigation, we do not believe that the resolution of this proceeding turns on any specific facts that are unique to this adjudication.

33. Nor do we believe that it would be appropriate, in passing on the constitutional and policy issues raised by our enforcement of the fairness doctrine, to limit our consideration of such issues to the one part of the fairness doctrine that we determined had been violated in this case. The fairness doctrine, although consisting of two parts,[98] is a unified doctrine; without both parts, the doctrine loses its identity. The litigants and courts in this and, indeed, the *Red Lion* case have all considered the validity of the doctrine as a whole, and not as two separate policies. They have considered the doctrine as such because neither part of the doctrine, standing separately, constitutes the fairness doctrine, for both parts of the doctrine are interdependent and integral to the overall regulatory scheme.[99] Consequently, if the constitutional infirmity

[98] *See supra* note 2.

[99] In 1949, the Commission attempted to articulate in a single concept what had previously been a generic notion of "fairness": "the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community by the particular station." *1949 Fairness Report*, 13 FCC at 1249. By developing the fairness doctrine, then, the Commission sought to impose two obligations with respect to the coverage of controversial issues and the presentation of contrasting viewpoints in order to fulfill one policy goal. The doctrine, for example, would not, by its own terms, achieve its purpose if it only required broadcasters to cover controversial issues of vital importance to their communities (the first part), for it would not also ensure that contrasting viewpoints on those issues would also be covered. Conversely, simply requiring broadcasters, when covering controversial issues of public importance, to provide reasonable coverage of contrasting viewpoints (the second part) would not achieve the purpose of the doctrine, because broadcasters could avoid this obligation altogether by simply refusing to cover controversial issues of public importance. Because each part of the doctrine gives life to the other, we find the two parts to be inextricably linked to constitute what is currently known as the fairness doctrine.

of the doctrine arises from the enforcement of one of its parts, we do not believe it appropriate to sever that part of the doctrine and to continue enforcing only the other part.[100]

34. Yet even if we were to sever the two prongs of the doctrine and consider and invalidate only that prong which was violated in this case, we would be left with something very different from the fairness doctrine. The first part of the fairness doctrine, by itself, although subject to a different regulatory focus and enforcement mechanism, may be compared to the already existing obligation of broadcasters to cover issues of importance to their communities.[101] Accordingly,

[100] When considering this issue in the context of statutes, courts look to the overall statutory scheme in determining whether the constitutionally infirm portion of the statute may be severed from the remaining portion. If the infirm portion is integral to the overall scheme, then the entire statute must fall, regardless of whether the rest of the statute, taken separately, would still be constitutional. *Compare EEOC v. Allstate Ins. Co.*, 570 F. Supp. 1224 (S.D. Miss. 1983), *appeal dism'd*, 467 U.S. 1232 (1984) (legislative veto not severable from statutory scheme), *with INS v. Chadha*, 462 U.S. 919 (1983) (legislative veto severable from statutory scheme). Similarly, we believe that if our enforcement of the second prong of the fairness doctrine against Meredith was unconstitutional, then the entire doctrine must fall, for the second prong, as stated above, is integral to the overall regulatory scheme and cannot, therefore, be severed.

[101] *See Report and Order* in MM Docket No. 83-670, 98 FCC 2d 1076, 1091-92 (1984), *recon. denied*, 104 FCC 2d 358 (1986), *remanded on other grounds sub nom., Action for Children's Television v. FCC*, No. 86-1425 (D.C. Cir. June 26, 1987) [*Television Deregulation*]; *Report and Order* in BC Docket No. 79-219, 84 FCC 2d 968, 977 (1981), *recon. denied*, 87 FCC 2d 797 (1981), *rev'd on other grounds sub nom., Office of Communications of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983) [*Radio Deregulation*]. We note that, because such obligations are different and do not lie within the fairness doctrine, they are not at issue in this proceeding.

retaining both obligations would be duplicative. There is thus no need to sever the two parts of the existing fairness doctrine in order to retain the obligation imposed by the first part.

35. In remanding this case to us, the Court of Appeals did not indicate that we were obligated to consider, or even that we should consider, the two parts of the doctrine separately, and, as stated above, we do not believe that we are otherwise obligated to do so. Our directive from the court was to consider the constitutionality and propriety of the fairness doctrine as it is currently administered. That doctrine, both on its face and as administered, contains two parts that, together, constitute the fairness doctrine. Accordingly, we consider the entire doctrine in this proceeding and decline to sever its parts from one another.

B. CONSTITUTIONAL CONSIDERATIONS UNDER *RED LION*

36. As more fully discussed below, the extraordinary technological advances that have been made in the electronic media since the 1969 *Red Lion* decision, together with a consideration of fundamental First Amendment principles, provide an ample basis for the Supreme Court to reconsider the premise or approach of its decision in *Red Lion*. Nevertheless, while we believe that the Court, after reexamining the issue, may well be persuaded that the transformation in the communications marketplace justifies alteration of the *Red Lion* approach to broadcast regulation,[102] we recognize that to date the Court has determined that governmental regulation of broadcast speech is subject to a standard of review under the First Amendment that is more lenient than the standard generally applicable to the print media.[103] Until the Supreme

[102] *1985 Fairness Report*, 102 FCC 2d at 155.

[103] *E.g.*, *FCC v. League of Women Voters of California*, 468 U.S. at 377. *See Red Lion Broadcasting Co. v. FCC*, *supra* n.18. Indeed, in criticizing the scarcity rationale employed by the Supreme Court in *Red Lion*, Judge Bork, in *TRAC v. FCC*, noted that until the Court revisits

Court reevaluates that determination, therefore, we shall evaluate the constitutionality of the fairness doctrine under the standard enunciated in *Red Lion* and its progeny.[104]

1. *Red Lion Broadcasting Co. v. FCC*

37. Eighteen years ago, the Supreme Court, in *Red Lion Broadcasting Co. v. FCC*, upheld the constitutionality of the fairness doctrine because it believed, at that time, that the doctrine promoted "the paramount [F]irst [A]mendment rights of viewers and listeners to receive 'suitable access to . . . ideas and experiences.' "[105] In that decision, the Court clearly articulated a First Amendment standard for evaluating broadcast regulation which provided less protection to the speech of broadcast journalists than that accorded to journalists in other media. The Court held that, "[i]n view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable

Red Lion, "neither [the Court of Appeals] nor the Commission is free to seek new rationales to remedy the inadequacy of the doctrine in this area." *TRAC v. FCC*, 801 F.2d at 509; *see also Branch v. FCC*, No. 86-1256, slip op. at 25-26 (D.C. Cir. July 21, 1987) (But unless the Court itself were to overrule *Red Lion*, we remain bound by it.).

[104] Some commenters, however, contend that the fact that the Supreme Court in *Red Lion* determined that the fairness doctrine was constitutional almost two decades ago mandates a finding by this Commission that the doctrine is constitutional today. We disagree. If this were so, the Court of Appeals would not have remanded this case for us to consider Meredith's constitutional arguments, because our initial failure to consider them would not have been reversible error. Indeed, for the reasons set forth below, we believe the rationale employed by the Court in *Red Lion* compels the conclusion that the fairness doctrine contravenes the First Amendment today, when evaluated consistent with the principles of *Red Lion*. Furthermore, the relationship between the application of constitutional principles in this area and the advances in technology are such, as the Supreme Court has indicated, that it is necessary to review past decisions to ensure their consistency with current technology. *See infra* 66-72.

[105] *American Security Council Education Foundation v. FCC*, 607 F.2d 438, 443- 44 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980), quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 389-90.

without government assistance to gain access to those frequencies for expression of their views,"[106] the government could require persons who were granted a license to operate "as a proxy or fiduciary with obligations to present those views and voices which are representative of his community."[107] The Court thus described what it subsequently characterized as "an unusual order of First Amendment values;"[108] it determined that governmental restrictions on the speech of broadcasters could be justified if they furthered the interests of listeners and viewers.

38. Although the Court in *Red Lion* articulated this standard for broadcast regulation, in several respects its holding was narrow in scope. First, the Court, in explicit terms, disclaimed an intention of "approv[ing] every aspect of the fairness doctrine."[109] Second, as the Court in *Meredith v. FCC* noted, the *Red Lion* decision "was expressly premised on the scarcity of broadcast frequencies 'in the present state of commercially available technology' as of 1969."[110] Third, and most importantly, the Court, in determining that the doctrine satisfied the requirements of the First Amendment, relied upon the Commission's express representation that there was no evidence that the doctrine "chills speech." The Court emphasized that if the fairness doctrine were found to inhibit broadcasters from covering controversial issues of public importance:

> Such a result would indeed be a serious matter for . . . the purposes of the doctrine would be stifled. At this point, however, as the Federal Communications Commission has indicated, that possibility is at best speculative . . . . The fairness doctrine in the past has had no such overall effect.[111]

The Court in *Red Lion* expressly stated that it would reconsider its holding "if experience with the administration of [the fairness doctrine] indicates that [it] ha[s] the net effect of reducing rather than enhancing the volume and quality of coverage [of controversial issues of public importance]."[112]

2. Application of the *Red Lion* Standard

39. Under the standard enunciated by the Supreme Court for assessing the constitutionality of broadcast regulation, "it is the right of the viewers and listeners and not the broadcasters which are paramount."[113] This standard permits the

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106 *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 395. The Court stated that "because the frequencies reserved for public broadcasting were limited in number, it was essential for the Government to tell some applicants that they could not broadcast at all because there was room for only a few." *Id.* at 388. We discuss the significance of this rationale more fully below. *See infra* 75-80. Although the Court's decision in *Red Lion* admittedly focused on the concept of spectrum or allocational scarcity—the fact that there were more individuals who wanted to broadcast than there were broadcast frequencies to award—the Court has also been concerned about the actual number of information outlets available in the electronic press. *See League of Women Voters of California v. FCC*, 468 U.S. at 376 n.11. To the extent that the Court is concerned about numerical scarcity in this medium, we believe, as more fully discussed below, that with the explosive growth in the number of electronic media outlets in the 18 years since *Red Lion*, there is no longer a basis for this concern. *See infra* 67-71 & 74.

107 *Id.* at 389.

108 *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 101 (1983).

109 *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 396.

110 *Meredith Corp. v. FCC*, 809 F.2d at 867, quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 388. The Court in *Red Lion* considered, *inter alia*, the state of technology in 1969 in deciding to apply a special, lenient constitutional standard to broadcast regulation. *Id.* at 396-400. It specifically recognized that "[t]he rapidity with which technological advances succeed one another . . . makes it unwise [for it] to speculate on the future allocation of that space." *Id.* at 399. The technological advances in the electronic media since the *Red Lion* decision are discussed *infra* at 67-71.

111 *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 393.

112 *Id.* at 391.

113 *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 390.

government to regulate the speech of broadcasters in order to promote the interest of the public in obtaining access to diverse viewpoints.[114]

40. In subsequent cases applying the *Red Lion* standard, the Supreme Court also recognized expressly that broadcasters have substantial rights under the First Amendment.[115] Indeed, the Court specified that in furthering the public's interest in viewpoint diversity, it "must necessarily rely in large part upon the editorial initiative and judgment of the broadcasters . . . ."[116] The Court has emphasized that "broadcasters are 'entitled under the First Amendment to exercise "the widest journalistic freedom consistent with their public [duties]." ' "[117] In addition, it has held that governmental

114 The *Red Lion* Court specified that:

> It is the right of the public to receive suitable access to social, political, esthethic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

Red Lion Broadcasting Co. v. FCC, 395 U.S. at 390. *Accord FCC v. League of Women Voters of California*, 468 U.S. at 377-78.

115 *See, e.g., FCC v. League of Women Voters of California*, 468 U.S. at 378; *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 110.

116 *FCC v. League of Women Voters of California*, 468 U.S. at 378 (citation omitted).

117 *FCC v. League of Women Voters of California*, 468 U.S. at 378, quoting *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981), quoting *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 110. The Court has emphasized that broadcasters have a significant amount of editorial discretion under the First Amendment. It has stated, in the context of a broadcast case, that:

> For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper and broadcast—can and do abuse this power is beyond doubt but. . . . the presence of these risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercise the guaranteed freedoms of expression.

Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. at 124-25.

restrictions on broadcasters' speech are permissible under the First Amendment only in situations in which those restrictions are "narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balanced coverage of public issues."[118]

41. An assessment of the constitutionality of the fairness doctrine under the standard established by *Red Lion* and its progeny, therefore, "requires a critical examination of the interests of the public and broadcasters."[119] We shall thus consider the constitutionality of the fairness doctrine from the perspective both of the public and the broadcast licensees. In so doing, we shall examine the record developed in this case and in the *1985 Fairness Report*[120] to determine, in accordance with existing Supreme Court precedent, whether the enforcement of the fairness doctrine (1) chills speech and results in the net reduction of the presentation of controversial issues of public concern[121] and (2) excessively infringes

118 *FCC v. League of Women Voters of California*, 468 U.S. at 380 (citation omitted). We note that this standard appears similar to the one employed in evaluating time, place and manner restrictions on the expression of non-electronic speech. *See, e.g., Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 293 (1984); *City of Renton v. Playtime Theatres*, 106 S. Ct. at 928. In general, the Court utilizes the lenient "time, place and manner" standard only in situations involving content-neutral regulations. *E.g., Clark v. Community for Creative Nonviolence*, 468 U.S. at 293. In *League of Women Voters*, the Court used this standard in evaluating a statute regulating speech on broadcast frequencies that was not content-neutral, presumably because of a lesser First Amendment right afforded broadcasters.

119 *FCC v. League of Women Voters of California*, 468 U.S. at 381.

120 We hereby incorporate the findings in the *1985 Fairness Report* into this record and, as more fully explained below, reaffirm the findings and conclusions contained in that *Report*.

121 *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 391, 393; *FCC v. League of Women Voters of California*, 468 U.S. at 378 n.12.

on the editorial discretion of broadcast journalists and involves unnecessary government intervention to the extent that it is no longer narrowly tailored to meet its objective.[122]

(a) Chilling Effect of the Doctrine

42. In the *1985 Fairness Report*, the Commission evaluated the efficacy of the fairness doctrine in achieving its regulatory objective. Based upon the compelling evidence of record, the Commission determined that the fairness doctrine, in operation, thwarts the purpose that it is designed to promote. Instead of enhancing the discussion of controversial issues of public importance, the Commission found that the fairness doctrine, in operation, "chills" speech.

43. The Commission documented that the fairness doctrine provides broadcasters with a powerful incentive not to air controversial issue programming above that minimal amount required by the first part of the doctrine.[123] Each time a broadcaster presents what may be construed as a controversial issue of public importance, it runs the risk of a complaint being filed, resulting in litigation and penalties, including loss of license. This risk still exists even if a broadcaster has met its obligations by airing contrasting viewpoints, because the process necessarily involves a vague standard, the application and meaning of which is hard to predict. Therefore, by limiting the amount of controversial issue programming to that required by the first prong (*i.e.*, its obligation to cover controversial issues of vital importance to the community), a licensee is able to lessen the substantial burdens associated with the second prong of the doctrine (*i.e.*, its obligation to present contrasting viewpoints) while conforming to the strict letter of its regulatory obligations. The licensee, consistent with its fairness doctrine obligations, may forego coverage of

122 *See FCC v. League of Women Voters of California*, 468 U.S. at 378, 380.

123 *1985 Fairness Report*, 102 FCC 2d at 161.

other issues that, although important, do not rise to the level of being vital.

44. As the Commission demonstrated, the incentives involved in limiting the amount of controversial issue programming are substantial. A broadcaster may seek to lessen the possibility that an opponent may challenge the method in which it provided "balance" in a renewal proceeding. If it provides one side of a controversial issue, it may wish to avoid either a formal Commission determination that it violated agency policy or the financial costs of providing responsive programming. More important, however, even if it intends to or believes that it has presented balanced coverage of a controversial issue, it may be inhibited by the expenses of being second-guessed by the government in defending a fairness doctrine complaint at the Commission, and if the case is litigated in court, the costs of an appeal. Further, in view of its dependence upon the goodwill of its audience, a licensee may seek to avoid the possible tarnish to its reputation that even an allegation that it violated the governmental policy of "balanced" programming could entail.[124]

45. Furthermore, the Commission determined that the doctrine inherently provides incentives that are more favorable to the expression of orthodox and well-established opinion with respect to controversial issues than to less established viewpoints.[125] The Commission pointed out that a number of broadcasters who were denied or threatened with the denial of renewal of their licenses on fairness grounds had provided controversial issue programming far in excess of the typical broadcaster. Yet these broadcasters espoused provocative opinions that many found to be abhorrent and extreme, thereby increasing the probability that these broadcasters would be subject to fairness doctrine challenges.[126] The Com-

124 *1985 Fairness Report*, 102 FCC 2d at 157-69.

125 *Id.* at 188-90.

126 *1985 Fairness Report*, 102 FCC 2d at 189.

mission consequently expressed concern that the doctrine, in operation, may have penalized or impeded the expression of unorthodox or unpopular opinion,[127] depriving the public of debates on issues of public opinion that are "uninhibited, robust, and wide-open."[128] The doctrine's encouragement to cover only major or significant viewpoints, with which much of the public will be familiar, inhibits First Amendment goals of ensuring that the public has access to innovative and less popular viewpoints.

46. As noted above, these various incentives are not merely speculative. The record compiled in the fairness inquiry revealed over 60 reported instances in which the fairness doctrine inhibited broadcasters' coverage of controversial issues. Although some have sought to disparage or discount the significance of some of the specific examples cited, we have carefully reviewed these criticisms and continue to believe that those specific instances of broadcasters' conduct were broadly illustrative of a prevalent reaction to the doctrine[129] and that the record from the inquiry overwhelmingly demonstrated that broadcasters act upon those incentives and limit the amount of controversial issue programming presented on the airwaves.

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127 *Id.* at 188.

128 *New York Times v. Sullivan*, 376 U.S. at 270. It should be noted that compliance with the fairness doctrine may involve the presentation of multiple opposing viewpoints. The notion that there are only two sides to any controversial issue of public importance is simplistic and, in most cases, unrealistic.

129 As we noted in the *1985 Fairness Report*, 102 FCC 2d at 181, a broadcaster's admission that it is inhibited from covering controversial issues of public importance is, to some extent, an admission against interest, because both journalistic standards and (in certain cases) government regulation require such coverage. Therefore, we believe that there are many more broadcasters who have been chilled, but have not so openly admitted, than the number of those who admitted so in the *1985 Fairness Report*.

47. The Commission demonstrated in the *1985 Fairness Report* that broadcasters—from network television anchors to those in the smallest radio stations—recounted that the fear of governmental sanction resulting from the doctrine creates a climate of timidity and fear, which deters the coverage of controversial issue programming.[130] The record contained numerous instances in which the broadcasters decided that it was "safer" to avoid broadcasting specific controversial issue programming, such as series prepared for local news programs, than to incur the potentially burdensome administrative, legal, personnel, and reputational costs of either complying with the doctrine or defending their editorial decisions to governmental authorities. Indeed, in the *1985 Fairness Report*, the Commission gave specific examples of instances in which broadcasters declined to air programming on such important controversial issues such as the nuclear arms race, religious cults, municipal salaries, and other significant matters of public concern.[131] In each instance, the broadcaster identified the fairness doctrine as the cause for its decision.

48. The record in the fairness inquiry demonstrated that this self-censorship is not limited to individual programs. In order to avoid fairness doctrine burdens, the Commission found that stations have adopted company "policies" which have the direct effect of diminishing the amount of controversial material that is presented to the public on broadcast stations. For example, some stations refuse to present editorials; other stations will not accept political advertisements[132]; still others decline to air public issue (or editorial) advertising; and others have policies to decline acceptance of nation-

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130 *Id.* at 171.

131 *Id.* at 172-74.

132 The political advertisements referred to by the Commission in the *1985 Fairness Report* are those that would not be subject to the reasonable access requirements of 47 U.S.C. § 312(a)(7) and could therefore be declined for broadcast by the licensee. *See generally id.* at 174-77, and *supra* note 91.

ally produced programming that discusses controversial subjects or to have their news staffs avoid controversial issues as a matter of routine.[133] The Commission concluded, therefore, that the doctrine "inhibits the presentation of controversial issues of public importance to the detriment of the public and in degradation of the editorial prerogatives of broadcast journalists."[134]

49. Further, we believe that enforcement actions such as the one in this proceeding provide substantial disincentives to broadcasters to cover controversial issues of importance in their community. As a direct result of the Commission second-guessing the editorial discretion of Meredith's station WTVH in its coverage of an important, controversial issue, Station WTVH became embroiled in a burdensome, regulatory quagmire. Even though it has, under today's decision, ultimately prevailed in this adjudication, the station has incurred substantial litigation expenses associated with the initial adjudication, the reconsideration proceeding, the case on appeal and the subsequent remand. Its reputation has been tarnished for nearly three years by a formal adjudication by this Commission that it was unfair in its programming and somehow did not live up to professional journalistic standards. In addition, its editorial judgment as a broadcast journalist has been subject to question by government authorities. Based upon this experience, we believe that, if we were to continue to impose the doctrine, some broadcasters would continue to seek to avoid the substantial burdens associated with the doctrine by limiting their coverage of controversial issues of public importance.

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133 *Id.* at 169-80. For example, in the Syracuse market from which the instant case arises, another commercial television station, WSTM, had a "policy" never to accept advocacy advertising. *See* Syracuse Peace Council Complaint, Exh. 2 (filed Dec. 12, 1983) (Letter from Corinne Kinane to Thomas Slaughter at 1-2).

134 *1985 Fairness Report*, 102 FCC 2d at 147.

50. Several commenters in this adjudication challenge the Commission's determination in 1985 that the fairness doctrine in operation inhibits the expression of controversial issues of public importance. The arguments presented by these parties, however, are the same contentions which already have been carefully considered and rejected by the Commission in its *1985 Fairness Report*.[135] Therefore, for the reasons set forth in that *Report*, we do not find them persuasive, and we reaffirm the fundamental determinations contained in the *1985 Fairness Report*.

51. Fisher Broadcasting Inc. was the sole broadcaster in this proceeding to assert to us that the fairness doctrine has not inhibited its stations' coverage of controversial issues of public importance.[136] In the 1985 inquiry, Westinghouse Broadcasting & Cable Co. was the sole broadcaster to make a similar claim.[137] We do not believe, however, that statements by these or other licensees demonstrate generally an absence of a "chilling effect" in the broadcasting industry. As we stated in the *1985 Fairness Report*:

> [W]e do not believe that the isolated representations of some broadcasters to the effect that the doctrine does not have any effect on the type, frequency or duration of the controversial viewpoints they air are probative of an absence of chilling effect within the industry as a whole; the fact that some broadcasters may not be inhibited in the presentation of controversial issues of public importance does not prove that broadcasters in general are similarly uninhibited.[138]

The record in that *Report* demonstrates that many broadcasters are in fact inhibited by fairness doctrine burdens from

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135 *Id.* at 167-68, 180-87.

136 Fisher Comments at 3.

137 *1985 Fairness Report*, 102 FCC 2d at 181-82.

138 *Id.* at 182.

covering controversial issues of public importance. No broadcaster indicated to us that its coverage of controversial issues has increased as a result of the fairness doctrine, and absent such evidence to offset the numerous instances of chill that we have identified, we can only conclude that the overall net effect of the doctrine is to reduce the coverage of controversial issues of public importance, in contravention of the standard announced in *Red Lion*.[139]

(b) The Extent and Necessity of Government Intervention into Editorial Discretion

52. As explained above, the Supreme Court has held that restrictions on the content of broadcasters' speech must be narrowly tailored to achieve a substantial government interest in order to pass constitutional muster.[140] As part of an analysis of such a requirement, we look to the *1985 Fairness Report*, in which the Commission examined the appropriate role of government in regulating the expression of opinion. Historically, the Commission has taken the position that the agency had an affirmative obligation, derived from the First Amendment, to oversee the content of programming through enforcement of the fairness doctrine in order to ensure the availability of diverse viewpoints to the public.[141] After care-

[139] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 391. Certain parties, such as Safe Energy Communication Council, set forth case studies in support of their view that the fairness doctrine promotes the discussion of controversial issues of public importance. In light of the substantial evidence contained in the *1985 Fairness Report*, however, we remain convinced that the net effect of the doctrine is to inhibit the expression of opinion on important public issues.

[140] *FCC v. League of Women Voters of California*, 468 U.S. at 380.

[141] For example, in what it characterized as "a different approach to the First Amendment," the Commission justified the fairness doctrine in its *1974 Fairness Report*, by taking the position that the agency had an affirmative obligation under the Constitution to impose restrictions on the speech of broadcasters in order to promote "balanced" controversial issue programming. 48 FCC 2d at 3. Even at the time of the *1974 Fairness Report*, however, the Commission recognized the anomaly in

ful reflection, however, the Commission, with respect to the fairness doctrine, repudiated the notion that it was proper for a governmental agency to intervene actively in the marketplace of ideas.[142] The Commission found that the enforcement of the doctrine requires the "minute and subjective scrutiny of program content,"[143] which perilously treads upon the editorial prerogatives of broadcast journalists. The Commission further found that in administering the doctrine it is forced to undertake the dangerous task of evaluating particular viewpoints.[144] The fairness doctrine thus indisputably represents an

justifying governmental scrutiny of speech allegedly to "promote" First Amendment values. *See supra* 83-94.

[142] *See 1985 Fairness Report*, 102 F.2d at 224-25. The Supreme Court has unambiguously repudiated any notion that the First Amendment affirmatively *requires* governmental intervention to ensure diversity in the marketplace of ideas. In *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 126-30, the Court reversed a lower appellate court decision which held that there was a constitutionally mandated "right of access" on the part of individual members of the public to have "some opportunity to take the initiative and editorial control into their own hands on the broadcast media." *Business Executives' Moves for Vietnam Peace v. FCC*, 450 F.2d 642, 656 (D.C. Cir. 1971), *rev'd sub nom. Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973). In deciding that members of the public had no constitutional right to place editorial advertisements, the Supreme Court emphasized that broadcasters have editorial discretion to determine the material which is to be covered. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 124-26. Further, noting the "difficult problems involved in implementing . . . a right of access," the Court recognized that a "problem of critical importance to broadcast regulation and the First Amendment [is] the risk of an enlargement of government control over the content of broadcast discussion of public issues." *Id.* at 126. *See Public Interest Research Group v. FCC*, 522 F.2d 1060, 1067 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 965 (1976) (court of appeals rejected contention that the First Amendment mandates enforcement of the fairness doctrine); *see also TRAC v. FCC*, 801 F.2d at 518.

[143] *1985 Fairness Report*, 102 FCC 2d at 191.

[144] Judge Bazelon recognized the danger in such a task when he stated: "Truth and fairness have a too uncertain quality to permit the government to define them. . . . [I]n order to determine what the 'other

intrusion into a broadcaster's editorial discretion, both in its enforcement and in the threat of enforcement. It requires the government to second-guess broadcasters' judgment on the issues they cover, as well as on the manner and balance of coverage. The penalties for noncompliance range from being required to provide free air time, under some circumstances, to providing contrasting viewpoints, in others, to loss of license, in extreme cases. Even though an individual violation might not lead to license revocation, the court in *Meredith* noted that the mere finding of a violation "has its own coercive impact."[145]

53. In this regard, the Commission noted that, under the fairness doctrine, a broadcaster is only required to air "major viewpoints and shades of opinion" to fulfill its balanced programming obligation under the second part of the doctrine.[146] In administering the fairness doctrine, therefore, the Commission is obliged to differentiate between "significant" viewpoints which warrant presentation to fulfill the balanced programming obligation and those viewpoints that are not deemed "major" and thus need not be presented. The doctrine forces the government to make subjective and vague value judgments among various opinions on controversial issues to determine whether a licensee has complied with its regulatory obligations.[147]

54. In addition, the Commission expressed concern that the fairness doctrine provides a dangerous vehicle—which had been exercised in the past by unscrupulous officials—for the intimidation of broadcasters who criticize governmental pol-

side' is, one has to have an objective concept of truth against which to compare the challenged speech. And who in this country is in possession of this objective concept of truth?" Bazelon, "FCC Regulation of the Telecommunications Press," 75 Duke L.J. 213, 236-37 (1975).

145 *Meredith Corp. v. FCC*, 809 F.2d at 873.

146 *1974 Fairness Report*, *supra* note 2, at 15.

147 *See, e.g., Coates v. Cincinnati*, 402 U.S. 611 (1970); *Cohen v. California*, 403 U.S. 15 (1970).

icy.[148] It concluded that the inherently subjective evaluation of program content by the Commission in administering the doctrine contravenes fundamental First Amendment principles.[149] We reaffirm these determinations and find that enforcement of the fairness doctrine necessarily injects the government into the editorial process of broadcast journalists.

55. In further analyzing whether the fairness doctrine is narrowly tailored to achieve a substantial government interest, we look again to our evaluation in the *1985 Fairness Report* of whether this type of government regulation is in fact necessary to ensure the availability of diverse sources of information and viewpoints to the public.[150] In that *Report*, the Commission undertook a comprehensive review of the information outlets currently available to the public. This review, as discussed in more detail below,[151] revealed an explosive growth in both the number and types of such outlets in every market since the 1969 *Red Lion* decision. And this trend has continued unabated since 1985. For example, 96% of the public now has access to five or more television stations. Currently, listeners in the top 25 markets have access to an average of 59 radio stations, while those in even the smallest markets have access to an average of six radio stations. In

148 *1985 Fairness Report*, 102 FCC 2d at 192-94.

149 In the *1985 Fairness Report*, the Commission determined that the administration of the doctrine requires the agency to make detailed determinations which are necessarily subjective. *See, e.g., id.* at 183 n.147.

150 Although the standard announced in *League of Women Voters* only requires the Commission to determine whether the doctrine is *narrowly tailored*—not *necessary*—to achieve a substantial government interest, our report in 1985 went so far as to determine that the doctrine was not necessary to achieve its purpose. Having determined that the doctrine is not necessary to serve a substantial government interest, then its intrusive means into the editorial process cannot possibly be narrowly tailored.

151 *See infra* 67-71. At this point in the discussion, we note that the increase in the number of media outlets available to the public not only discredits the claim of numerical scarcity in the electronic media, but

contrast to that, only 125 cities have two or more daily newspapers published locally. Nationwide, there are 1315 television and 10,128 radio stations, while recent evidence indicates that there are 1657 daily newspapers. The number of television stations represents a 54% increase since the *Red Lion* decision, while the number of radio stations represents a 57% increase. Not only has the number of television and radio stations increased the public's access to a multiplicity of media outlets since 1969, but the advent and increased availability of such other technologies as cable and satellite television services have dramatically enhanced that access. As a result of its 1985 review, the Commission determined that "the interest of the public in viewpoint diversity is fully served by the multiplicity of voices in the marketplace today"[152] and that the growth in both radio and television broadcasting alone provided "a reasonable assurance that a sufficient diversity of opinion on controversial issues of public importance [would] be provided in each broadcast market."[153] It concluded, therefore, and we continue to believe, that government regulation such as the fairness doctrine is not necessary to ensure that the public has access to the marketplace of ideas.

56. None of the commenters in this proceeding has challenged the underlying data contained in the *1985 Fairness Report* demonstrating the significant increase in the number and types of information services. In its Comments, however, the ACLU attempts to discount the importance of the Commission's findings. For example, disputing the significance of the substantial growth in the number of television stations, the ACLU argues that most of this increase has been in UHF independent stations which, it speculates, may not contribute to the diversity of viewpoints.[154] We disagree. The ACLU has

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also demonstrates that the doctrine is no longer narrowly tailored to achieve its objective.

152 *1985 Fairness Report*, 102 FCC 2d at 147.

153 *Id.* at 208.

154 ACLU Comments at 8-11.

provided no meaningful basis for us to reconsider our conclusion that independent stations can contribute—and do contribute—significantly to the marketplace of ideas. Therefore, we continue to believe that the contributions of UHF stations must be considered in any meaningful assessment of the information services marketplace.[155]

57. In its Comments, the ACLU also attempts to downplay the importance of our finding that the number of signals received by individual television viewers has increased substantially. In making its argument, the ACLU does not question the existence of the substantial growth in the number of signals available to individual television households.[156] Rather, it argues that not all of the signals of these stations originate in the viewers' community of license.[157] However, as we stated in our *1985 Fairness Report*, in assessing viewpoint diversity in the context of the fairness doctrine, "the relevant inquiry is not what stations are licensed to a community, but rather what broadcast signals [an individual] can actually receive."[158] Viewers can obtain information on controversial issues of public importance from stations which they can receive whether or not the signal happens to originate in their community.[159] Similarly, citing the *1985 Fairness Report*, the

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155 Citing newspaper and magazine articles, the ACLU contends that some of these stations are "struggling for economic survival." *Id.* at 8-9. As we stated in our *1985 Fairness Report*, however, we believe that "the growth of this service—113 percent since *Red Lion*—is evidence of its economic viability." 102 FCC 2d at 206. While every station may not be successful, we do not believe that any persuasive evidence has been proffered to justify a conclusion that electronic media choices will not continue to increase or that they will not continue to contribute to the diversity of viewpoints.

156 Indeed, it specifically cites the Commission's finding that 96 percent of all television households are capable of receiving five or more off-the-air television signals. ACLU Comments at 9.

157 *Id.* at 9.

158 *1985 Fairness Report*, 102 FCC 2d at 219 (citation omitted).

159 In addition, we reject ACLU's contention that there may be no increase in viewpoint diversity from the increase in the number of tele-

ACLU acknowledges that the number of radio stations has increased dramatically.[160] It speculates, however, that "despite the dramatic growth of radio over the past three decades, viewpoint diversity on controversial issues of public importance *may* not have changed. . . ."[161] Specifically, it argues that most of the increase is in FM stations which, in its view, carry less controversial issue programming than their AM counterparts, and that public affairs programming on radio generally has decreased.[162] We are not persuaded by these speculative contentions. To the contrary, we remain convinced that the dramatic growth in the number of both radio stations and television stations has in fact increased the amount of information, as well as the diversity of viewpoints, available to the public in both large and small broadcast markets.[163] We

vision stations because the members of the public may choose not to listen or to view the controversial opinions that are broadcast. *See* ACLU Comments at 10. The Commission cannot force the dissemination of information on unwilling listeners and viewers. Our concern is properly limited to the availability of information sources, rather than whether a particular individual may choose to receive information from them.

160 *Id.* at 12. Indeed, it recognizes that the number of radio stations has increased by "280 percent since the Commission's *1949 Fairness Report*; 48 percent since the Supreme Court's 1969 *Red Lion* decision; and 30 percent since the Commission's *1974 Fairness Report*." *Id.* at 12 (citation omitted).

161 *Id.* at 15 (emphasis added).

162 *Id.* at 10-14.

163 ACLU asserts that the "average" person listens to only a few stations. Because most radio listeners actually hear only the viewpoints which are aired on a few stations, ACLU suggests that the growth in the number of stations does not equate with an increase in viewpoint diversity. *Id.* at 14. It also states that "people primarily rely today on television for news and public affairs, and increasingly consider radio to be largely an entertainment medium." *Id.* at 15. We believe, however, that the relevant criterion is the available information rather than the actual listening patterns of the public. Furthermore, the number of radio stations providing an all-news/public affairs format, news breaks or top of the hour news spots leads us to conclude that listeners do not rely on radio only for its entertainment programming.

therefore reaffirm our determination in the *1985 Fairness Report* that the fairness doctrine is not necessary in any market to ensure that the public has access to diverse viewpoints from today's media outlets. Its intrusive means of interfering with broadcasters' editorial discretion, therefore, can no longer be characterized as narrowly tailored to meet a substantial government interest.

(c) Conclusion

58. As noted above, under the standard of review set forth in *Red Lion*, a governmental regulation such as the fairness doctrine is constitutional if it furthers the paramount interest of the public in receiving diverse and antagonistic sources of information. Under *Red Lion*, however, the constitutionality of the fairness doctrine becomes questionable if the chilling effect resulting from the doctrine thwarts its intended purpose. Applying this precedent, we conclude that the doctrine can no longer be sustained.

59. In the *1985 Fairness Report*, we evaluated whether the fairness doctrine achieved its purpose of promoting access to diverse viewpoints. After compiling a comprehensive record, we concluded that, in operation, the fairness doctrine actually thwarts the purpose which it is designed to achieve. We found that the doctrine inhibits broadcasters, on balance, from covering controversial issues of public importance. As a result, instead of promoting access to diverse opinions on controversial issues of public importance, the actual effect of the doctrine is to "overall lessen[ ] the flow of diverse viewpoints to the public."[164] Because the net effect of the fairness doctrine is to reduce rather than enhance the public's access to viewpoint diversity, it affirmatively disserves the First Amendment interests of the public. This fact alone demon-

164 *1985 Fairness Report*, 102 FCC 2d at 171.

strates that the fairness doctrine is unconstitutional under the standard of review established in *Red Lion*.[165]

60. Furthermore, almost two decades of Commission experience in enforcing the fairness doctrine since *Red Lion* convince us that the doctrine is also constitutionally infirm because it is not narrowly tailored to achieve a substantial government interest. Because the fairness doctrine imposes substantial burdens upon the editorial discretion of broadcast journalists and, because technological developments have rendered the doctrine unnecessary to ensure the public's access to viewpoint diversity, it is no longer narrowly tailored to meet a substantial government interest and therefore violates the standard set forth in *League of Women Voters*.[166] The doctrine requires the government to second-guess broadcasters' judgment on such sensitive and subjective matters as the "controversiality" and "public importance" of a particular issue, whether a particular viewpoint is "major," and the "balance" of a particular presentation. The resultant overbreadth of the government's inquiry into these matters is demonstrated by the chill in speech that we have identified. The doctrine exacts a penalty, both from broadcasters and, ultimately, from the public, for the expression of opinion in the electronic press. As a result, broadcasters are denied the editorial discretion accorded to other journalists, and the public is deprived of a more vigorous marketplace of ideas, unencumbered by governmental regulation.

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165 The Court expressly stated that:

> were it to be shown by the Commission that the fairness doctrine has "the net effect of reducing rather than enhancing" speech, we would then be *forced* to reconsider the constitutional basis of our decision in that case.

FCC v. League of Women Voters of California, 468 U.S. at 378 n.12, quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 393 (emphasis added).

166 *FCC v. League of Women Voters of California*, 460 U.S. at 380.

61. In sum, the fairness doctrine in operation disserves both the public's right to diverse sources of information and the broadcaster's interest in free expression. Its chilling effect thwarts its intended purpose, and it results in excessive and unnecessary government intervention into the editorial processes of broadcast journalists. We hold, therefore, that under the constitutional standard established by *Red Lion* and its progeny, the fairness doctrine contravenes the First Amendment and its enforcement is no longer in the public interest.

C. PREFERRED CONSTITUTIONAL APPROACH

62. Our review of the Supreme Court precedent in the application of First Amendment principles to the electronic media leads to an inescapable conclusion: throughout the development of these principles, the Supreme Court has repeatedly emphasized that its constitutional determinations in this area of the law are closely related to the technological changes in the telecommunications marketplace. For example, in the *Red Lion* decision itself, the Court indicated that advances in technology could have an effect on its analysis of the constitutional principles applicable to the electronic media.[167] The Court of Appeals noted this in *Meredith v. FCC*, when it said that the *Red Lion* decision "was expressly premised on the scarcity of broadcast frequencies 'in the present state of commercially available technology' as of 1969."[168] And in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, the Supreme Court stated that:

> Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of

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167 *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 397-99 (indicating that its decision was based on the technology of the day).

168 *Meredith Corp. v. FCC*, 809 F.2d at 867, quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 388.

> great delicacy and difficulty . . . . The problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded ten years hence.[169]

63. The Court's most recent statement on this issue came in its decision in *FCC v. League of Women Voters of California*. Acknowledging that certain persons, including former Chairman Mark Fowler, "charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete,"[170] the Court indicated that it may be willing to reassess its traditional reliance upon spectrum scarcity upon a "signal" from the Congress or this Commission "that technological developments have advanced so far that some revision of the system of broadcast regulation may be required."[171]

64. That principles applicable to the government's regulation of a rapidly changing industry such as telecommunications should be revisited and revised in light of technological advances is not an unusual proposition. Indeed, the Commission, in its task of managing an ever-changing technological and economic marketplace, has the responsibility to consider new developments in reviewing existing, and in applying new,

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169 412 U.S. at 102.

170 468 U.S. at 376 n.11 (citations omitted).

171 *Id.* at 377 n.11. The United States Court of Appeals for the District of Columbia Circuit on several occasions has also indicated that the increase in the number of information outlets may affect the extent to which the speech of broadcasters is protected under the First Amendment. *Loveday v. FCC*, 707 F.2d 1443, 1459 (D.C. Cir.), *cert. denied*, 464 U.S. 1008 (1983); *Banzhaf v. FCC*, 405 F.2d 1000 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969). *See TRAC v. FCC*, 801 F.2d at 508 nn.4-5.

rationales in that marketplace.[172] With respect to the fairness doctrine itself, a policy that the Commission defended before the Supreme Court in 1969, our comprehensive study of the telecommunications market in the *1985 Fairness Report* has convinced us that a rationale that supported the doctrine in years past is no longer sustainable in the vastly transformed, diverse market that exists today. Consequently, we find ourselves today compelled to reach a conclusion regarding the constitutionality of the fairness doctrine that is very different from the one we reached in 1969.

65. We believe that the *1985 Fairness Report*, as reaffirmed and further elaborated on in today's action, provides the Supreme Court with the signal referred to in *League of Women Voters*.[173] It also provides the basis on which to reconsider its application of constitutional principles that were developed for a telecommunications market that is markedly different from today's market. We further believe that the scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press. Therefore, in response to the question raised by the Supreme Court in *League of Women Voters*, we believe that the standard applied in *Red Lion* should be reconsidered and that the constitutional

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172 *E.g.*, *Television Deregulation*, *supra* note 101; *Radio Deregulation*, *supra* note 101. It is appropriate for an administrative agency to modify or eliminate its policies if the conditions addressed by the regulation have changed. *See, e.g., NAACP v. FCC*, 682 F.2d 993, 998 (D.C. Cir. 1982). *See generally, Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. at 57. As the Supreme Court has stated, "the Commission should be alert to the consequences of its policies and should stand ready to alter its rule if necessary to serve the public interest more fully." *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 603 (1981). Further, an agency should not continue to regulate if it can no longer perceive a need for governmental regulation. *NAACP v. FCC*, 682 F.2d at 1000-01.

173 In fact, the D.C. Circuit also suggested that our *1985 Fairness Report* was such a signal. *Branch v. FCC*, No. 86-1256, slip op. at 25-26 (D.C. Cir. July 21, 1987); *see also TRAC v. FCC*, 801 F.2d at 509 n.5.

principles applicable to the printed press should be equally applicable to the electronic press.

1. Basis for Reconsidering *Red Lion*

66. In the *1985 Fairness Report*, the Commission examined, in a comprehensive manner, the number and types of outlets currently providing information to the public, including the traditional broadcast services, the new electronic sources, and the print media.[174] The Commission found in recent years that there had been an explosive growth in both the number and types of outlets providing information to the public. Hence, the Supreme Court's apparent concern that listeners and viewers have access to diverse sources of information has now been allayed.

67. With respect to the number of radio stations, the Commission demonstrated that in 1985 there were 9,766 radio stations nationwide, a 48 percent increase in radio stations overall since the date of the Supreme Court's decision in *Red Lion* and a 30 percent increase in the number of radio stations since the *1974 Fairness Report*. As stated above, that number now stands at 10,128 a 54% increase since the 1969 *Red Lion* decision. The Commission also concluded in the *1985 Fairness Report* that the growth in FM stations, in particular, had been dramatic. Specifically, the Commission found that this service had increased by 113 percent since the *Red Lion* decision and by 60 percent since the *1974 Fairness Report*.[175] Further, the Commission found "of particular significance" the fact that the number of radio voices in each local market had

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174 Because "the various media are in fact information substitutes in the marketplace of ideas" (*1985 Fairness Report*, 102 FCC 2d at 199), the Commission determined that it was appropriate to consider the different outlets in the information services marketplace in assessing the continued need for the fairness doctrine. *Id.* at 198-202.

175 *1985 Fairness Report*, 102 FCC 2d at 202-04. Today, there are 5,241 FM stations, more than a 100% increase since *Red Lion*.

grown.[176] With continuing technological advances in spectrum efficiency, the Commission predicted that the number of radio outlets would continue to increase.[177]

68. With respect to television stations, the Commission documented that in 1985 the number of television stations overall was 1,208, an increase of 44.3 percent since the *Red Lion* decision and 28 percent since *1974 Fairness Report*. And that number has increased to 1315 today, a 57% increase since the 1969 *Red Lion* decision. The Commission also found in the *1985 Fairness Report* the growth in UHF stations in particular to have been even more dramatic than the overall growth in television stations: the number of UHF stations increased by 113 percent since the *Red Lion* decison and 66.4 percent since the *1974 Fairness Report*. The Commission found further that the growth in television broadcasting has directly resulted in a significant increase in the number of signals available to individual viewers in both the larger and smaller markets. Specifically, without the enhancing capability of cable television, the Commission determined that 96 percent of the television households receive five or more television signals. In 1964, only 59 percent of these households were able to receive five or more stations. With the growth of UHF television, the increase in the importance of independent television and the development of new program distribution systems among group owners, the Commission also found that the structure of the medium had become more competitive.[178]

69. Although the Commission found that the number of radio and television outlets alone ensured that the public had access to diverse sources of information in each broadcast

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176 *Id.* at 203.

177 *Id.* We note that the numbers of radio stations cited by way of example herein do not include the number of outstanding allocations for which licenses have not yet been issued. Including recent FM radio allocations, 1266 allotments are available for licensing in due course by the Commission.

178 *Id.* at 204-07.

market (large and small),[179] it also found that cable television, which had increased exponentially during the period from 1969 to 1985, had enhanced significantly the amount of information available to the public.[180] Since the *1974 Fairness Report*, the Commission demonstrated that the number of persons subscribing to cable television had increased by 345 percent and the number of cable systems had increased by 111 percent. Based upon its assessment of the marketplace, the Commission predicted that cable television would continue to expand in the future. It determined further that there had been a significant change in the nature of cable service, as the number of channels available to individual subscribers had increased dramatically. For example, in 1969 only 1 percent of all cable systems had the capability of carrying more than 12 channels; by 1987 69 percent of all cable systems (and 92% of cable subscribers) had this capacity. Thus, in addition to the substantial increases in the absolute number of cable systems and in the percentage of cable subscribers, the Commission concluded that the amount of information available to an individual viewer on a single cable system had increased.[181] The statistical data contained in ACLU's comments actually support a reaffirmation of this determination. Characterizing cable as "the most dynamic video medium today,"[182] the ACLU states that "[a]pproximately 71 million television households—74.7 percent of all television households—have access to cable television service."[183] It also notes that 47 percent of all television households are actual

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179 *Id.* at 208.

180 It is also significant that the presence of cable in the smaller markets may often enhance the number of accessible broadcast outlets in those markets. *See id.* at 210.

181 *Id.* at 209-10; *Television Factbook*, Services Volume, at A-41 (1987).

182 ACLU Comments at 18.

183 *Id.* (citation omitted).

subscribers of that service.[184] It asserts further that both the availability and number of subscribers to cable television will continue to increase. Specifically, in three years it predicts that almost 90 percent of television households will have access to cable and that 54 percent will subscribe to it.[185]

70. In addition, the Commission evaluated the contributions of a number of new electronic technologies unavailable at the time of the *Red Lion* decision, including low power television, MMDS, video cassette recorders (VCRs), and satellite master antenna systems (SMATV). It found that each of these new services also were contributing significantly to the diversity of information available to the public.[186] Noting the development of a number of additional information technologies, the Commission determined that there were a number of other electronic services, such as direct home to satellite services, satellite news gathering, subscription television, FM radio subcarriers, teletext, videotext and home computers "have the potential of becoming substitute information sources in the marketplace of ideas."[187] Some of these technologies, such as teletext and videotext, are beginning to merge characteristics of the electronic media with those of the print media, further complicating the choice of an appropriate constitutional standard to be applied to their regulation.[188]

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184 More than 43,000,000 households now subscribe to cable services according to *Nielson Media Research* (1987).

185 ACLU Comments at 18-19.

186 *1985 Fairness Report*, 102 FCC 2d at 208-17. In its *1985 Fairness Report*, the Commission also considered the role of the print media in the information services marketplace. It concluded that newspapers and magazines, as well as the electronic media, contribute significantly to the marketplace of ideas. *Id.* at 217-18.

187 *Id.* at 214; *see id.* at 208-17.

188 Additionally, newspaper reporters are increasingly relying on the use of the spectrum to send their messages to their editors and ultimately to the printing presses.

71. As noted above, none of the commenters in this proceeding has challenged the underlying data contained in the *1985 Fairness Report* with respect to the dramatic increase in the number and types of alternative technologies available to the public. For instance, ACLU's own data demonstrate the soundness of our determination that the number of broadcast outlets has exploded and that cable television has evolved into a significant information source. In its Comments, the ACLU also asserts that in the short period of time since the *1985 Fairness Report*, the number of low power television stations has increased by 12 percent from 341 stations to 383 stations.[189]

72. We believe that the dramatic changes in the electronic media, together with the unacceptable chilling effect resulting from the implementation of such regulations as the fairness doctrine,[190] form a compelling and convincing basis on which to reconsider First Amendment principles that were developed for another market. Today's telecommunications market offers individuals a plethora of information outlets to which they have access on a daily basis. Indeed, this market is strikingly different from even that offered by the daily print media. While there are 11,443 broadcast stations nationwide, recent evidence indicates that there are only 1657 daily newspapers overall.[191] On a local level, 96% of the public has access to five or more television stations, while only 125 cities have two or more local newspapers. The one-newspaper town is becoming an increasing phenomenon. Our review of the Supreme Court's statements on the relationship between constitutional principles and technological developments leads us to conclude that it would now be appropriate for the Supreme Court to reassess its *Red Lion* decision.

189 ACLU Comments at 17.

190 *See supra* 42-51.

191 Of the media universe that is composed of newspapers, AM and FM radio stations, and television stations, 87% is made up of broadcast facilities.

2. The Scarcity Rationale

73. Certain parties, taking the position that the basis underlying the scarcity rationale in *Red Lion* is either illogical or anachronistic, assert that the appropriate constitutional test to assess content-based regulations of the electronic media is the one enunciated for the print media.[192] These commenters point to the explosive growth in the number and types of information sources in support of their assertion that the scarcity doctrine is no longer viable. Other commenters, in contrast, state that the general standards of First Amendment jurisprudence applied by the Court in cases not involving broadcast regulation are irrelevant in determining whether the fairness doctrine and other content-based regulations are constitutional. They assert that the increase in the number and types of information sources has nothing to do with the existence of scarcity in the constitutional sense, and emphasize that the appropriate standard of review is that applied by the Court in *Red Lion* and its progeny specifically relating to broadcast regulation.[193] These parties describe two different notions of scarcity—numerical scarcity and spectrum (or allocational) scarcity. We do not believe that any scarcity rationale justifies differential First Amendment treatment of the print and broadcast media.

74. As stated above, we no longer believe that there is scarcity in the number of broadcast outlets available to the public. Regardless of this conclusion, however, we fail to see how the constitutional rights of broadcasters—and indeed the rights of the public to receive information unencumbered by government intrusion—can depend on the number of infor-

192 *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1971); *see also infra* 95-96.

193 These commenters maintain that scarcity, as it has been defined by the Supreme Court, is a state where "there are substantially more individuals who want to broadcast than there are frequencies to allocate." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 388.

mation outlets in particular markets. Surely, a requirement of multiple media outlets could not have formed the basis for the framers of the First Amendment to proscribe government interference with the editorial process. At the time the First Amendment was adopted, there were only eight daily newspapers, seventy weekly newspapers, ten semi-weekly newspapers and three tri-weekly newspapers published in America.[194]

75. Because there is no longer a scarcity in the number of broadcast outlets, proponents of a scarcity rationale for the justification of diminished First Amendment rights applicable to the broadcast medium must rely on the concept of spectrum (or allocational) scarcity. This concept is based upon the physical limitations of the electromagnetic spectrum. Because only a limited number of persons can utilize broadcast frequencies at any particular point in time, spectrum scarcity is said to be present when the number of persons desiring to disseminate information on broadcast frequencies exceeds the number of available frequencies. Consequently, these frequencies, like all scarce resources, must be allocated among those who wish to use them.

76. In fact, spectrum scarcity was one of the bases articulated by the Court in *Red Lion* for the disparate treatment of the broadcast and the print media. Reliance on spectrum scarcity, however, "has come under increasing criticism in recent years."[195] For example, the Court of Appeals has recently questioned the rationality of spectrum scarcity as the basis for differentiating between the print and broadcast media. In *TRAC v. FCC*, the Court asserted that:

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194 *Inquiry Into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees* in Gen. Docket No. 84-252, 49 Fed. Reg. 20,317 (May 14, 1984) at 51.

195 *FCC v. League of Women Voters of California*, 468 U.S. at 376 n.11.

> [T]he line drawn between the print media and the broadcast media, resting as it does on the physical scarcity of the latter, is a distinction without a difference. Employing the scarcity concept as an analytic[al] tool . . . inevitably leads to strained reasoning and artificial results.
>
> It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism. . . . Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion.[196]

We agree with the court's analysis of the spectrum scarcity rationale, and we believe that it would be desirable for the Supreme Court to reconsider its use of a constitutional standard based upon spectrum scarcity in evaluating the intrusive type of content-based regulation at issue in this proceeding.

77. At the outset, we note that the limits on the number of persons who can use frequencies at any given time is not absolute, but is, in part, economic: greater expenditures on equipment and/or advances in technology could make it possible to utilize the spectrum more efficiently in order to permit a greater number of licensees. So the number of outlets in a market is potentially expandable, like the quantities of most other resources.

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196 801 F.2d at 508 (footnotes omitted). Asserting that the "scarcity" rationale is not a rational basis for distinguishing between the *Red Lion* and *Tornillo* decisions, the Court of Appeals in effect urged the Supreme Court to "revisit this area of the law." *Id.* at 509.

78. Nevertheless, we recognize that technological advancements and the transformation of the telecommunications market described above have not eliminated spectrum scarcity. All goods, however, are ultimately scarce, and there must be a system through which to allocate their use. Although a free enterprise system relies heavily on a system of property rights and voluntary exchange to allocate most of these goods, other methods of allocation, including first-come-first-served, administrative hearings, lotteries, and auctions, are or have been relied on for certain other goods. Whatever the method of allocation, there is not any logical connection between the method of allocation for a particular good and the level of constitutional protection afforded to the uses of that good.

79. In the allocation of broadcast frequencies, the government has relied, for the most part, on a licensing scheme based on administrative hearings to promote the most effective use of this resource.[197] Congress has also authorized the allocation of frequencies through the use of lotteries.[198] Moreover, although the government allocates broadcast frequencies to particular broadcast speakers in the initial licensing stage, approximately 71% of today's radio stations and 54% of today's television stations have been acquired by the current licensees on the open market.[199] Hence, in the vast majority of

197 A number of the provisions of the Communications Act and our implementing regulations relate to the licensing of broadcast frequencies and related functions. *See, e.g.*, 47 U.S.C. §§ 301-10 (1982). The system of licensing in the public interest established by the Communications Act of 1934, as amended, is designed to determine the persons who may utilize broadcast frequencies.

198 47 U.S.C. § 309(i) authorizes the Commission to award licenses for the use of the electromagnetic spectrum by random selection. The Commission has used lotteries to award licenses in such services as LPTV and cellular radio.

199 The Commission passes on the basic qualifications of transferees once they have been identified by the existing licensee. *See generally* 47 U.S.C. § 309. Of course, even upon transfer, the license carries with it the obligations imposed by the Commission pursuant to the Communications Act.

cases, broadcast frequencies are "allocated"—as are the resources necessary to disseminate printed speech—through a functioning economic market. Therefore, after initial licensing, the only relevant barrier to acquiring a broadcast station is not governmental, but—like the acquisition of a newspaper—is economic.

80. Additionally, there is nothing inherent in the utilization of the licensing method of allocation that justifies the government acting in a manner that would be proscribed under a traditional First Amendment analysis. In contexts other than broadcasting, for example, the courts have indicated that, where licensing is permissible, the First Amendment proscribes the government from regulating the content of fully protected speech.[200] There are those who argue that the acceptance by broadcasters of government's ability to regulate the content of their speech is simply a fair exchange for their ability to use the airwaves free of charge. To the extent, however, that such an exchange allows the government to engage in activity that would be proscribed by a traditional First Amendment analysis, we reject that argument. It is well-established that government may not condition the receipt of a public benefit on the relinquishment of a constitutional right.[201] The evil of government intervention into the editorial

200 *E.g.*, *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Clark v. Community for Creative Non-Violence*, 468 U.S. at 293-95.

201 *E.g.*, *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (Although no one has a constitutional right to receive a government benefit, government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."); *Shapiro v. Thompson*, 394 U.S. 618 (1968). In this regard, we note that Congress has conferred upon newspapers the benefit of certain exemptions from the antitrust laws without also claiming the ability to regulate the content of the matters reported in those newspapers. *See* 15 U.S.C. §§ 1801-04.

(footnote continued)

process of the press (whether print or electronic) and the right of individuals to receive political viewpoints unfettered by government interference are not changed because the electromagnetic spectrum (or any other resource necessary to convey expression) is scarce or because the government (in conjunction with the marketplace) allocates that scarce resource.[202] Indeed, the fact that government is involved in

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Moreover, the fact that government may license broadcasters to use frequencies in order to minimize interference, and thus to maximize the effective dissemination of speech through the electromagnetic spectrum, does not justify content regulation. As Judge Bork noted:

> A publisher can deliver his newspapers only because government provides streets and regulates traffic on the streets by allocating rights of way. Yet no one would contend that the necessity for these governmental functions, which are certainly analogous to the government's function in allocating broadcast frequencies, would justify regulation of the content of a newspaper to ensure that it serves the needs of the citizens.

TRAC v. FCC, 801 F.2d at 509. We see no reason why the grant of a broadcast license by the government should also give rise to its ability to control the content of broadcasters' speech. In other words, allocational scarcity does not justify government regulation in violation of constitutional rights.

202 We note that during World War II, for example, the government rationed the supply of newsprint and other scarce resources, but that allocation did not give rise to the government's content-based regulation of the print media. *See generally Supplies for a Free Press: Hearings Before the Subcomm. on Newsprint of the Senate Select Comm. on Small Business*, 82d Cong., 1st Sess. (1951). Indeed, the scarcity of newsprint extended throughout the war and well into the post-war period. During this time, many papers, especially dailies, were forced by circumstances to adopt such practices as circulation freezing, size reduction, and switching to weekly publication. Indications are that the shortage of newsprint due to government rationing caused many smaller newspapers to go out of business, in addition to creating a substantial barrier to those who desired entry into newspaper publishing. Yet the policy of newsprint allocation under government auspices, which caused a reduction in the overall amount of newspaper speech—due either to those who left or those who could not enter—did not give rise to the imposition of obligations on the remaining newspapers to make their facilities available for those speakers who were silenced. *See id.*

(footnote continued)

licensing is all the more reason why the First Amendment protects against government control of content.[203]

81. On the other hand, the fact that government may not impose unconstitutional conditions on the receipt of a public benefit does not preclude the Commission's ability, and obligation, to license broadcasters in the public interest, convenience and necessity. The Commission may still impose certain conditions on licensees in furtherance of this public interest obligation. Nothing in this decision, therefore, is intended to call into question the validity of the public interest standard under the Communications Act.

82. Rather, we simply believe that, in analyzing the appropriate First Amendment standard to be applied to the electronic press, the concept of scarcity—be it spectrum or

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The Founding Fathers themselves were apparently well aware of the problems associated with scarcity in the print media. The great "paper famine," for example, occurred during the Revolutionary War when the colonies were cut off from their principal suppliers. *Id.* The existence of this scarcity, however, did not appear to affect the founders' decision to accord the press the full measure of editorial control guaranteed by the First Amendment.

203 The ability of government to control the content of individuals' speech is particularly disturbing when the government must also license those who wish to speak, because the potential for chilling speech beyond the proper scope of government concern—intentionally or unintentionally—is greater. This is a concern that carries into licensing schemes in other contexts, *see supra* note 200, and stems from the belief that "government must remain neutral in the marketplace of ideas." *FCC v. Pacifica Foundation*, 438 U.S. at 745. Broadcast licensees must deal routinely with the government on matters wholly unrelated to the content of their broadcasts. They necessarily will want to avoid any conflict with the government in handling these routine matters and, therefore, are especially susceptible to the roving eye of the government, which many times may act in an informal and unofficial manner. The relationship can be precarious even if the government has no express authority to regulate the content of speech. The grant of that express authority, however, can upset the already delicate balance that exists between the government and a free press. *See Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397, 407-10 (D.C. Cir. 1975) (Bazelon, J., dissenting from denial of rehearing).

numerical—is irrelevant.[204] As Judge Bork stated in *TRAC v. FCC*, "Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion."[205] Consequently, we believe that an evaluation of First Amendment standards should not focus on the *physical differences* between the electronic press and the printed press, but on the *functional similarities* between these two media and upon the underlying values and goals of the First Amendment. We believe that the function of the electronic press in a free society is identical to that of the printed press and that, therefore, the constitutional analysis of government control of content should be no different.[206] With this

[204] That spectrum scarcity should be irrelevant for First Amendment purposes does not affect its relevance to the Commission's allocational and licensing function. The Commission, of necessity, considers spectrum scarcity in making its allocational and licensing decisions. *See supra* note 197.

[205] *TRAC v. FCC*, 801 F.2d at 508.

[206] There are those who argue that the content of broadcasters' speech may be regulated by the government because of the impact that broadcasters can have on listeners and viewers. These proponents contend that broadcasting is a far more powerful means of communication than the printed press, and, therefore, the public should be protected from those who use the broadcast medium. We will assume for the sake of argument that broadcasters have greater "impact" than their counterparts in the print media, but we nevertheless reject the impact argument. We do not believe that the expression of speech may be regulated by government, consistent with the First Amendment, on the basis of the effectiveness of that expression. *Cf. First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. Valeo*, 424 U.S. 1 (1975). In fact, the rationale of the First Amendment counsels the exact opposite conclusion: the greater the effectiveness of certain speech, the more reason, given the First Amendment's presumption against government control of the press, why government should be prohibited from interfering with the ideas conveyed by such speech.

This conclusion was supported by Justice William O. Douglas, who aptly stated in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 152 n.3:

> The implication that the people of the country—except the proponents of the theory—are mere unthinking automatons manip-

in mind, we return to the *Red Lion* decision and consider its divergence from traditional First Amendment precepts protecting the role of the press in a democratic society.

3. Divergence of *Red Lion* from Traditional First Amendment Precepts

83. We believe that the articulation of lesser First Amendment rights for broadcasters on the basis of the existence of scarcity, the licensing of broadcasters, and the paramount rights of listeners[207] departs from traditional First Amendment jurisprudence in a number of respects.[208] Specifically, the

> ulated by the media, without interests, conflicts, or prejudices is an assumption which I find quite maddening. The development of constitutional doctrine should not be based on such hysterical overestimation of media power and underestimation of the good sense of the American public.

See also 1985 Fairness Doctrine, 102 FCC 2d at 221-25.

[207] Justice Douglas, who did not participate in the *Red Lion* decision, later stated that he would not have supported the Court's conclusion that the fairness doctrine did not violate the First Amendment. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 154. He explained:

> the prospect of putting government in a position of control over publishers is to me an appalling one, even to the extent of the Fairness Doctrine. The struggle for liberty has been a struggle against Government. The essential scheme of our Constitution and Bill of Rights was to take government off the backs of people. . . . [I]t is anathema to the First Amendment to allow Government any role of censorship over newspapers, magazines, books, art, music, TV, radio, or any other aspect of the press. There is unhappiness in some circles at the impotence of government. But if there is to be a change, let it come by constitutional amendment. The Commission has an important role to play in curbing monopolistic practice, in keeping channels free from interference, in opening up new channels as technology develops. But it has no power of censorship.

Id. at 162.

[208] The Court may have implicitly recognized this departure when, five years later in *Tornillo*, it struck down a statute applicable to newspapers that was similar to the fairness doctrine without ever mentioning

Court's decision that the listeners' rights justifies government intrusion appears to conflict with several fundamental principles underlying the constitutional guarantee of free speech.

84. First, this line of decisions diverges from Supreme Court pronouncements that "the First Amendment 'was fashioned to assure *unfettered* interchange of ideas for the bringing about of political and social changes desired by the people.' "[209] The framers of that Amendment determined that the best means by which to protect the free exchange of ideas is to prohibit any governmental regulation which "abridg[es] the freedom of speech or of the press."[210] They believed that the marketplace of ideas is too delicate and too fragile to be entrusted to governmental authorities.

85. In this regard, Justice Potter Stewart once stated that "[t]hose who wrote our First Amendment put their faith in the proposition that a free press is indispensable to a free society. They believed that 'fairness' was far too fragile to be left for a government bureaucracy to accomplish."[211] In the same vein, Justice Byron White has stated that:

> Of course, the press is not always accurate, or even responsible, and may not present full and fair debate on

or citing *Red Lion*. The Court of Appeals has stated that "[d]espite [the] holding [in *Red Lion*], important constitutional questions continue to haunt this area of the law. The doctrine and the rule do, after all involve the government to a significant degree in policing the content of communication. There are abiding First Amendment difficulties." *Straus Communications Inc. v. FCC*, 530 F.2d 1001, 1008 (D.C. Cir. 1976). *See TRAC v. FCC*, 801 F.2d at 506-09.

209 *Connick v. Myers*, 461 U.S. 138, 145 (1983), quoting *Roth v. United States*, 354 U.S. 476, 484 (1957) (emphasis added); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

210 U.S. CONST. amend. I.

211 *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 145-46 (Stewart, J., concurring).

> important public issues. But the balance struck by the First Amendment with respect to the press is that society must take the risk that occasionally debate on vital matters will not be comprehensive and that all viewpoints may not be expressed. . . . Any other accommodation—any other system that would supplant private control of the press with the heavy hand of government intrusion—would make the government the censor of what the people may read and know.[212]

Indeed, the Supreme Court has often emphasized that:

> The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint *or fear of subsequent punishment*.[213]

Consequently, a cardinal tenet of the First Amendment is that governmental intervention in the marketplace of ideas of the sort involved in the enforcement of the fairness doctrine is not acceptable and should not be tolerated.

86. The fairness doctrine is at odds with this fundamental constitutional precept. While the objective underlying the fairness doctrine is that of the First Amendment itself—the promotion of debate on important controversial issues—the means employed to achieve this objective, government coercion, is the very one which the First Amendment is designed to prevent.[214] As the Supreme Court has noted, "By

212 *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 260 (1974) (White, J., concurring) (*Tornillo*).

213 *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940) (footnote omitted) (emphasis added), quoted in *FCC v. League of Women Voters of California*, 468 U.S. at 381-82. *Accord First National Bank of Boston v. Bellotti*, 435 U.S. 765, 766 (1978); *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, 447 U.S. 530, 534-35 (1980).

214 It is well established that the mere invocation of a laudatory regulatory objective, by itself, does not demonstrate the constitutionality

protecting those who wish to enter the marketplace of ideas from governmental attack, the First Amendment protects the public's interest in receiving information."[215] Yet the fairness doctrine *uses* government intervention in order to foster diversity of viewpoints, while the scheme established by the framers of our Constitution *forbids* government intervention for fear that it will stifle robust debate. In this sense, the underlying rationale of the fairness doctrine turns the First Amendment on its head.

87. Indeed, even when approving the doctrine in the *1974 Fairness Report*, the Commission recognized the anomaly of a policy which purports to further First Amendment values by the very mechanism proscribed by that constitutional provision. In that *Report*, the Commission explained that:

> th[e] [doctrine's] affirmative use of government power to expand broadcast debate would seem to raise a striking paradox, for freedom of speech has traditionally implied an absence of governmental supervision or control. Throughout most of our history, the principal function of the First Amendment has been to protect the free marketplace of ideas by precluding governmental intrusion.[216]

88. The *Red Lion* decision also is at odds with the well-established precept that First Amendment protections are especially elevated for speech relating to matters of public concern, such as political speech and other matters of public

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of a governmental regulation. *See, e.g., Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1454 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 2889 (1986). Indeed, the Supreme Court, in both *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 106 S. Ct. 903 (1986), and *Tornillo*, declared unconstitutional state action, in the context of printed material, which was designed to further the same governmental purpose underlying the fairness doctrine. *See infra* 95.

215 *Pacific Gas & Electric Co. v. Public Utility Commission of California*, 106 S.Ct. at 907.

216 *1974 Fairness Report*, 48 FCC 2d at 3.

importance. Indeed, the Supreme Court, in the context of broadcast regulation, recently stated that the expression of opinion on matters of public concern is "entitled to the most exacting degree of First Amendment protection."[217] The Court has recognized that this type of speech is "indispensible to decisionmaking in a democracy."[218] As the Court has stated, "speech concerning public affairs is more than self-expression; it is the essence of self-government."[219] Because

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217 *FCC v. League of Women Voters of California*, 468 U.S. at 375-76 (citation omitted). *See, e.g., Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct. 1558, 1565 (1986); *Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2945-46 (1985), quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978), quoting *Thornhill v. Alabama*, 310 U.S. at 101 (It is speech on " 'matters of public concern' " that is "at the heart of the First Amendment protection."); *Connick v. Myers*, 461 U.S. at 145, quoting *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 913 (1982) ([T]he Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values'. . . .).

218 *First National Bank of Boston v. Bellotti*, 435 U.S. at 777. The Court explained that:

> "The maintenance of the opportunity for free political discussion to the end that government may be responsibe to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."

New York Times Co. v. Sullivan, 376 U.S. at 269, quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931).

219 *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). As a plurality of the Supreme Court recently stated, "[t]he constitutional guarantee of free speech 'serves significant societal interests' wholly apart from the speaker's interest in self-expression. By protecting those who wish to enter the marketplace of ideas from governmental attack, the First Amendment protects the public's interest in receiving information." *Pacific Gas & Electric Co. v. Public Utility Commission of California*, 106 S. Ct. at 907, quoting *First National Bank of Boston v. Bellotti*, 435 U.S. at 776. "The individual's interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion, although the two often converge." *First National Bank of Boston v. Bellotti*, 435 U.S. at 777 n.12.

it is the people in a democratic system who "are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments,"[220] the "[g]overnment is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves."[221]

89. The type of speech regulated by the fairness doctrine involves opinions on controversial issues of public importance. This type of expression is "precisely that . . . which the Framers of the Bill of Rights were most anxious to protect—speech that is 'indispensible to the discovery and spread of political truth'. . . ."[222] Yet, instead of safeguarding this type of speech from regulatory intervention, the doctrine anomalously singles it out for governmental scrutiny.

90. Further, the *Red Lion* decision cannot be reconciled with well-established constitutional precedent that governmental regulations directly affecting the content of speech are subjected to particularly strict scrutiny.[223] The Supreme Court has emphasized that "[i]f the marketplace of ideas is to remain free and open, governments must not be allowed to choose 'which issues are worth discussing or debating. . . .' "[224] As noted above, enforcement of the fairness doc-

220 *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 791 (1977).

221 *Id.* at 792 n.31 (citations omitted). *Consolidated Edison Co. of New York, Inc. v. Public Utility Commission of New York*, 447 U.S. 530 (1980).

222 *FCC v. League of Women Voters of California*, 468 U.S. at 383, quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

223 *See, e.g., FCC v. League of Women Voters of California*, 468 U.S. at 383-84; *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984); *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984). *Compare, e.g., Tornillo, supra* note 192, *with United States v. O'Brien*, 391 U.S. 367 (1968).

224 *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, 447 U.S. at 537-38, quoting Police Department of Chicago v. Mosley, 408 U.S. at 96 (ellipsis in original).

trine not only forces the government to decide whether an issue is of "public importance," but also whether the broadcaster has presented "significant" contrasting viewpoints. Unorthodox minority viewpoints do not receive favored treatment as do their "significant" counterparts. As the Court recently asserted, "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."[225]

91. The difference in the *Red Lion* approach becomes apparent when considering the validity of the fairness doctrine. The fairness doctrine indisputably regulates the content of speech. Like the statute invalidated in *FCC v. League of Women Voters of California*, "enforcement authorities must necessarily examine the content of the message that is conveyed to determine whether the views expressed concern 'controversial issues of public importance.' "[226] Yet even in the *League* case, the Court applied a standard that the regulation be narrowly tailored to achieve a substantial government interest, a standard traditionally reserved for content-neutral regulations.[227] In contrast, a traditional First

225 *Regan v. Time, Inc.*, 468 U.S. 641, 649 (1984). *See also Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1982), quoting *New York Times v. Sullivan*, 376 U.S. at 270 (Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'). *Accord Carey v. Brown*, 447 U.S. 462, 463 (1980). The Court of Appeals, in the context of broadcast regulation, has asserted that "[t]he First Amendment is unmistakeably hostile to governmental controls over the content of the press." *Banzhaf v. FCC*, 405 F.2d 1082, 1100 (D.C. Cir. 1968) (footnote omitted), *cert. denied*, 396 U.S. 842 (1969).

226 *FCC v. League of Women Voters of California*, 468 U.S. at 383 (quotation omitted).

227 *See, e.g., Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984). In *Renton v. Playtime Theatres, Inc.*, 106 S. Ct. 925 (1986), the Supreme Court determined that an ordinance which imposed more stringent zoning restrictions upon adult theaters than upon other kinds of theaters was not a content-based regulation. The purpose of the ordinance was to avoid urban blight and preserve the quality of urban

Amendment analysis would require a content-based regulation, such as the fairness doctrine, to be a "precisely drawn means of serving a compelling state interest."[228] Even under a traditional approach, therefore, content-based regulations

life, and thus the Court found the ordinance to be "justified without reference to the content of speech." *Id.* at 929 (emphasis and quotation omitted). In *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 106 S. Ct. 903 (1986)—a case decided on the same day as *Renton*—the Court invalidated a regulation that required a utility which disseminated political editorials to publish the views of its opponent as well. The plurality determined that the regulation at issue in that case was content-based because it "discriminates on the basis of the viewpoints of the selected speakers." *Id.*. at 910. It explained that the governmental purpose "in exposing [ratepayers] to a variety of viewpoints is not . . . content-neutral." *Id.* at 914. Thus, the Supreme Court has distinguished between content-neutral governmental actions, like the ordinance in Renton, whose justification was found to be unrelated to the content of speech and content-based regulations, like the one invalidated in *Pacific Gas & Electric*.

The fairness doctrine is clearly content-based. Fairness doctrine obligations do not attach to every discussion or even to those involving a controversial issue of public importance. The doctrine is implicated only where the speaker expresses an opinion on a controversial issue of public importance. Furthermore, as stated earlier, the fairness doctrine differentiates between "major" or "significant" opposing viewpoints, which qualify for coverage under the second part of the doctrine, and those opinions that are not sufficiently significant to trigger responsive programming obligations. As a consequence, in administering the doctrine, the Commission "inexorably favors orthodox viewpoints" over those which may be unpopular or unestablished. *1985 Fairness Report*, 102 FCC 2d at 188. The fairness doctrine is very different from governmental actions such as the mandatory carriage rules for cable television operators *Carriage of Television Broadcast Signals by Cable Television Systems*, 1 FCC Rcd 864 (1986), *recon. denied*, FCC 87-105 (May 1, 1987), *petition for review docketed sub nom. Turner Broadcasting System, Inc. v. FCC*, No. 86-1682 (D.C. Cir. filed December 12, 1986), the justification for which is unrelated to the content of speech and which do not distinguish among classes of speakers on the basis of the subject matter of their expression. Simply stated, where viewpoint is the trigger of government-imposed obligations, those obligations cannot be considered content-neutral.

228 *Consolidated Edison v. Public Service Comm'n*, 447 U.S. 530, 540 (1980).

are not necessarily invalid, but they are subject to a much higher standard of review than the one applicable to the broadcast media.

92. Because the dissemination of a particular viewpoint by a broadcaster can trigger the burdens associated with broadcasting responsive programming, the doctrine directly penalizes—through the prospect or reality of government intrusion—the speaker for expressing his or her opinion on a matter of public concern.[229] For even if the broadcaster has, in fact, presented contrasting viewpoints, the government, at the request of a complainant, may nevertheless question the broadcaster's presentation, which in and of itself is a penalty for simply covering an issue of public importance.

93. In this regard, we note that sound journalistic practice already encourages broadcasters to cover contrasting viewpoints on a topic of controversy. The problem is not with the goal of the fairness doctrine, it is with the use of government intrusion as the means to achieve that goal. With the existence

229 In certain cases, the doctrine may compel a speaker actively to publish opinions that are directly contrary to his or her own, and on which he or she would prefer to remain silent. The Supreme Court has emphasized that coercing a person to disseminate particular opinions is contrary to fundamental First Amendment guarantees. The Court explained that:

> [T]he right of freedom of thought protected by the First Amendment . . . includes both the right to speak freely and the right to refrain from speaking at all. A system which secures the right to proselytize religious, political and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind."

Wooley v. Maynard, 430 U.S. 705, 714 (1977), *quoting West Virginia Board of Education v. Barnette*, 319 U.S. 624, 637 (1943). The fairness doctrine is thus a government-imposed obligation that "both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set." *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 106 S. Ct. at 908.

of a fairness doctrine, broadcasters who intend to, and who do in fact, present contrasting viewpoints on controversial issues of public importance are nevertheless exposed to potential entanglement with the government over the exercise of their editorial discretion. Consequently, these broadcasters may shy away from extensive coverage of these issues. We believe that, in the absence of the doctrine, broadcasters will more readily cover controversial issues, which, when combined with sound journalistic practices, will result in more coverage and more diversity of viewpoint in the electronic media; that is, the goals of the First Amendment will be enhanced by employing the very means of the First Amendment: government restraint.

94. Finally, we believe that under the First Amendment, the right of viewers and listeners to receive diverse viewpoints is achieved by guaranteeing them the right to receive speech unencumbered by government intervention. The *Red Lion* decision, however, apparently views the notion that broadcasters should come within the free press and free speech protections of the First Amendment as antagonistic to the interest of the public in obtaining access to the marketplace of ideas. As a result, it is squarely at odds with the general philosophy underlying the First Amendment, *i.e.*, that the individual's interest in free expression and the societal interest in access to viewpoint diversity are both furthered by proscribing governmental regulation of speech. The special broadcast standard applied by the Court in *Red Lion*, which sanctions restrictions on speakers in order to promote the interest of the viewers and listeners, contradicts this fundamental constitutional principle.[230]

4. First Amendment Standard Applicable to the Press

95. Under a traditional First Amendment analysis,[231] the type of governmental intrusion inherent in the fairness

230 *See 1985 Fairness Report*, 102 FCC 2d at 153 n.39.

231 *See supra* 91.

doctrine would not be tolerated if it were applied to the print media.[232] Indeed, in *Miami Herald Publishing Co. v. Tornillo*,[233] the Supreme Court struck down, on First Amendment grounds, a Florida statute that compelled a newspaper to print the response of a political candidate that it had criticized. Invoking a purpose strikingly similar to the fairness doctrine, the state had attempted to justify the statute on the grounds that the "government has an obligation to ensure that a wide variety of views reach the public."[234] The Court reasoned that the mechanism employed by the state in implementing this objective, however, was "governmental coercion,"[235] and thus contravened "the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years."[236] The Court also found that a governmentally imposed right of reply impermissibly "intrud[ed] into the function of editors."[237] In addition, the Court stated that the inevitable result of compelling the press "to print that which it would not otherwise print"[238] would be to reduce the amount of debate on governmental affairs:

> Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted

232 The Supreme Court has specifically noted that the type of governmental regulation sanctioned by *Red Lion* and its progeny "has never been allowed with respect to the print media." *FCC v. League of Women Voters of California*, 468 U.S. at 377 (citation omitted).

233 418 U.S. 241 (1974).

234 *Id.* at 248 (footnote omitted).

235 *Id.* at 254.

236 *Id.*

237 *Id.* at 258.

238 *Id.* at 256.

> or reduced. Government-enforced right of access inescapably " 'dampens the vigor and limits the variety of public debate.' "[239]

Also, the fact that a newspaper could simply add to its length did not dissuade the Court from concluding that the access requirement would improperly intrude into the editorial discretion of the newspaper.[240]

96. Relying on *Tornillo*, the Court, in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*,[241] recently determined that a state administrative order requiring a utility to place the newsletter of its opponents in its billing envelopes contravened the First Amendment.[242] "[B]ecause access was awarded only to those who disagreed with [the utility's] views and who are hostile to [the utility's] interests,"[243] Justice Lewis Powell, in the plurality opinion, expressed concern that "whenever [the utility] speaks out on a given issue, it may be forced . . . to help disseminate hostile views."[244] As a consequence, the regulation had the effect

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239 *Id.* at 257, *quoting New York Times Publishing Co. v. Sullivan*, 376 U.S. at 279. Further, expressly noting that print journalists are not "subject to the finite technological limitations of time that confront a broadcaster . . ." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. at 256-57, the Court intimated that our regulations may produce even greater inhibitions than the "right to reply" statute invalidated in *Tornillo*.

240 *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. at 256-57.

241 106 S. Ct. 903 (1986). *See supra* note 227.

242 Like the fairness doctrine, the asserted governmental interest underlying the state administrative order was to promote access to diversity of opinions. The Court was unpersuaded that the legitimacy of the asserted governmental "interest in promoting speech by making a variety of views available to appellant's customers," *id.* at 914 (citation omitted), was sufficient to withstand a First Amendment challenge.

243 *Id.*. at 910.

244 *Id.* at 910. The plurality also determined that it was constitutionally impermissible for the state to require the utility "to associate with speech with which [it] may disagree." *Id.* at 911.

of reducing the free flow of information and ideas that the First Amendment seeks to promote. In evaluating the utility's First Amendment rights to be free from governmentally-coerced speech, the plurality expressly stated that it was irrelevant that the ratepayers, rather than the utility, owned the extra space in the billing envelopes. It asserted that the "forced association with potentially hostile views burdens the expression of views . . . and risks forcing [the utility] to speak where it would prefer to remain silent"[245] irrespective of who is deemed to own this extra space.[246]

97. We believe that the role of the electronic press in our society is the same as that of the printed press. Both are sources of information and viewpoint. Accordingly, the reasons for proscribing government intrusion into the editorial discretion of print journalists provide the same basis for proscribing such interference into the editorial discretion of broadcast journalists. The First Amendment was adopted to protect the people *not from journalists, but from government*. It gives the people the right to receive ideas that are unfettered by government interference. We fail to see how that right changes when individuals choose to receive ideas from the electronic media instead of the print media. There is no doubt that the electronic media is powerful and that broadcasters can abuse their freedom of speech. But the framers of

---

245 *Id.* at 913.

246 As the plurality explained:

> A different conclusion would necessarily imply that our decision in *Tornillo* rested on Miami Herald's ownership of the space that would have been used to print candidate replies. Nothing in *Tornillo* suggests that the result would have been different had the Florida Supreme Court decided that the newspaper space needed to print candidates' replies was the property of the newspapers' readers . . . . The constitutional difficulty with the right-of-reply statute was that it required the newspaper to disseminate a message with which the newspaper disagreed.

Id. at 913.

the Constitution believed that the potential for abuse of private freedoms posed far less a threat to democracy than the potential for abuse by a government given the power to control the press. We concur. We therefore believe that full First Amendment protections against content regulation should apply equally to the electronic and the printed press.

IV. CONCLUSION

98. The court in *Meredith Corp. v. FCC* "remand[ed] the case to the FCC with instructions to consider [Meredith's] constitutional arguments."[247] In response to the court's directive, we find that the fairness doctrine chills speech and is not narrowly tailored to achieve a substantial government interest. We therefore conclude, under existing Supreme Court precedent, as set forth in *Red Lion* and its progeny, that the fairness doctrine contravenes the First Amendment and thereby disserves the public interest. We have reached these determinations only after the most careful and searching deliberation. We believe, however, that the evidence presented in the recent fairness inquiry and the record in this proceeding leads inescapably to these conclusions. Each member of this Commission has taken an oath to support and defend the United States Constitution and, as the court in *Meredith v. FCC* stated, "to enforce a Commission-generated policy that the Commission itself believes is unconstitutional may well constitute a violation of that oath."[248] As a consequence, we determine that the editorial decision of station WTVH to broadcast the editorial advertisements at issue in this adjudication is an action protected by the First Amendment from government interference. Accordingly, we reconsider our prior determinations in this matter and conclude that the Constitution bars us from enforcing the fairness doctrine against station WTVH.

247 *Meredith Corp. v. FCC*, 809 F.2d at 874.

248 *Id.*

99. We further believe, as the Supreme Court indicated in *FCC v. League of Women Voters of California*, that the dramatic transformation in the telecommunications marketplace provides a basis for the Court to reconsider its application of diminished First Amendment protection to the electronic media. Despite the physical differences between the electronic and print media, their roles in our society are identical, and we believe that the same First Amendment principles should be equally applicable to both. This is the method set forth in our Constitution for maximizing the public interest; and furthering the public interest is likewise our mandate under the Communications Act. It is, therefore, to advance the public interest that we advocate these rights for broadcasters.

100. ACCORDINGLY, IT IS ORDERED, that the Motion for Leave to File Comments Out-of-Time of the American Civil Liberties Union and the Motion to Submit Late-Filed Comments filed by the Safe Energy Communication Council ARE GRANTED.

101. IT IS FURTHER ORDERED, that the Motion for Leave to File Supplement of Meredith Corporation IS GRANTED and the supplement IS ACCEPTED.

102. IT IS FURTHER ORDERED, that the Petition for Reconsideration filed by Meredith Corporation IS GRANTED to the extent indicated herein, and the Order adopted October 26, 1984 IS VACATED.

103. IT IS FURTHER ORDERED, that the complaint of the Syracuse Peace Council IS DENIED.

104. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.[249]

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico,
Secretary

249 As in any adjudicatory matter, this Order shall become effective on the day after the day it is released. 47 C.F.R. § 1.4(b).

APPENDIX

List of Commenting Parties

Accuracy-in-Media
American Advertising Federation
American Association of Advertising Agencies
American Civil Liberties Union
American Newpaper Publishers Association
American Society of Newspaper Editors
Anti-Defamation League of B'nai B'rith
Bronet, Lester Charles
Bunch, Virginia
CBS, Inc. (CBS)
Caruso, Rita M.
Cester, Judith
Demaree, Patrick
DeJager, Everett
Democratic National Committee, Democratic Congressional Campaign Committee, and Democratic Senatorial Campaign Committee
Dowd, Diane
Ellis, Houston
Erikson, Michael
Fisher Broadcasting
Freedom of Expression Foundation (FEF)
Group W
Holthaus, Robert
Jansa, M.A.
Jenkinson, Stanley
Landmark Legal Foundation
Meredith Corp. (Meredith)
Moore, Sally Anne
National Association of Broadcasters (NAB)
NBC., Inc.
New York State Consumer Protection Board

Office of Communications of the United Church of Christ; Communication Commission, National Council of Churches; Henry Geller and Donna Lampert
Pomery, June S.
Postrel, Virginia I.
Radio-Television News Directors Association (RTNDA), CBS, NAB, FEF, Gannettt Co., Inc. (Gannett), Gaylord Broadcasting Co. (Gaylord), Meredith, Multimedia, Inc., Post-Newsweek Stations, Inc. and Society of Professional Journalists, Sigma Delta Chi
RTNDA, Gannett, and Gaylord
Rochester Committee for Broadcasting
Safe Energy Communication Council
Schultz, Connie
Spielberg, Sol
Speech Communications Association
Spitzer, Jack
Swartsel, Laura
Syracuse Peace Council
Thiel, Paul
Thurston, Helen
United States Catholic Conference
Villadsen, L.A.
Vroon, Peter,
Wilkin Consulting Services

MOTION FILED

FEB 20 1997

(24)

No. 96-511

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

JANET RENO, Attorney General
of the United States, et al., ***Appellants***

v.

AMERICAN CIVIL LIBERTIES UNION, et al., ***Appellees***

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

MOTION FOR LEAVE TO FILE AN OUT OF TIME AMICUS CURIAE BRIEF UNDER RULE 37(3)(b) WITH ATTACHED BRIEF AMICUS CURIAE OF JAMES J. CLANCY (MEMBER OF THE SUPREME COURT BAR) SUGGESTING REVERSAL OF THE JUDGMENT FOR A.C.L.U, ET AL., APPELLEES UPON THE AUTHORITY OF *RALPH GINZBURG v. U.S.*, 383 U.S. 463 (1966) AND JUDGE LEARNED HAND'S "VARIABLE OBSCENITY" PRINCIPLES

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February 17, 1997

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187 pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 96-511

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Now comes James J. Clancy, attorney at law and a member of the Supreme Court Bar, to move this Court for leave to file an out of time Brief Amicus Curiae, suggesting a reversal of the judgment for Plaintiff A.C.L.U., et al. below, upon the authority of *Ralph Ginzburg, et al. v. U.S.*, 383 U.S. 463, 16 L.Ed.2d 31, 86 S.Ct. 942; rehearing denied, 384 U.S. 934, 16 L.Ed.2d 536, 86 S.Ct. 1440 (March 21,1966) and Judge Learned Hand's "variable obscenity" principles. This motion is made necessary for the purpose of bringing to the attention of the Court relevant matter not already brought to its attention by the

parties, and is necessary because neither the Solicitor General's Brief, nor the Brief of Amici Curiae have discussed ***Ginzburg v. U.S.***, supra, which in moving party's judgment, should control the disposition of this appeal.

My filing of a timely Amicus Curiae Brief was virtually impossible under **Rule 37**, in that the earliest "date certain" that such deficiency could be discovered was the date such briefs were "published" (filed) and thereafter "examined" for content. Under these circumstances, any brief explaining the defect would be tardy.

The background facts in support of this motion are set forth hereinafter:

On or about February 3, 1997, I received a complementary copy of the Brief Amici Curiae filed on or about January 20, 1997 for certain Members of Congress in ***Reno, Attorney General of the United States, et al. v. A.C.L.U., et al.***, No. 96-511, in Support of Appellants. In my judgment, this brief was uniformly outstanding, except that it did not discuss the impact of ***Ginzburg, et al. v. U.S.***, supra, and the federal "pandering" obscenity crime (which this Court upheld in the ***Ginzburg*** decision and, by its very nature, requires a reversal of the judgment below which upheld the facial attack).

Thereafter, I took steps to obtain a copy of the Solicitor General's Brief for Appellants and undertook a study of both briefs. My examination disclosed that neither brief had analyzed or considered the impact of this Court's opinion in ***Ralph Ginzburg, et al. v. U.S.***, 383 U.S. 463, 16 L.Ed.2d 31, 86 S.Ct. 942; rehearing denied, 384 U.S. 934, 16 L.Ed.2d 536, 86 S.Ct. 1440 (March 21, 1966) (interpreting **18 U.S.C. §1461**).

Ginzburg et al v. U.S., supra, materially changed the law of obscenity, by confirming the existence of **two**

types of federal obscenity crimes: **one** that regulated "obscenity in the abstract" (obscenity vel non) and did not require a "scienter" mens rea, other than "knowledge of the contents", ***Rosen v. U.S.***, 161 U.S. 606 (1896), and **the other**, described as "variable obscenity" and "pandering" obscenity which focused on the "scienter" mens rea aspect, and did not require proof that the subject matter was "obscenity in the abstract" (obscenity vel non). An explanation of this latter development, in relation to the appeal of Ralph Ginzburg, is discussed hereinafter in the attached Brief Amicus Curiae under the topic "Interest of Amicus Curiae, James J. Clancy".

In recent years, legal scholars have inordinately focused upon the federal crime of "obscenity in the abstract" (to the exclusion of the "pandering" obscenity crime), and today urge this Court to solve the problem by enunciating a new "hard-core pornography" standard (see Brief Amici Curiae for Member of Congress at page 13, footnotes 15 and 16).

This habitual focus of the federal judiciary and federal bar on the federal obscenity crime as a crime involving "obscenity vel non" has resulted in a neglect and failure to consider and analyze the impact of the ***Ginzburg*** "variable pandering" obscenity crime on the pleading requirements of the **Communications Decency Act of 1996.**

Because of my personal involvement in Ginzburg's appeal (see "Interest of Amicus Curiae, James J. Clancy" at **page 2-5**) and my knowledge of its constitutional import and potential contemporary impact, I considered it to be my duty as a member of this Court's Bar to move the Court for leave to file this "out of time" amicus curiae brief in support of a reversal of the judgment for Appellants A.C.L.U., et al., upon the authority of Justice Brennan's majority decision in ***Ginzburg, et al. v. U.S.***, supra, and

Judge Learned Hand's "variable obscenity" principles which are still the law today.

Rule 37(3)(a) requires that an Amicus Curiae Brief in Support of Neither Party should be filed with the Brief for the Appellants. One would reasonably expect that the "pandering" crime impact of ***Ginzburg, et al. v. U.S.***, supra, would be treated by either the Solicitor General or one of the supporting amicus curiae briefs. A defect of this nature will not be ascertainable until a "date certain" (as in this case) after the Brief for Appellants has been filed and after the interested parties have had an opportunity to examine the same, which "date certain" upon ascertainment is then, by its very nature, "tardy" under **Rule 37(3)(a)**. This rule, as applied to these facts, is unreasonable and should not defeat this Motion.

In the past, this Court has allowed an out of time brief to be filed under similar circumstances. See Motion of James J. Clancy for Leave to File a Brief Amicus Curiae Out of Time in ***Barnes v. Glen Theatre, et al.***, in the Supreme Court of the United States, October Term, 1990, No. 90-26. On January 7, 1991, this Court entered an order in ***Barnes v. Glen Theatre, et al.***, at 498 U.S. 1021, reading, "The motion of James J. Clancy for leave to file a brief (our of time) as Amicus Curiae is Granted." A copy of that Amicus Curiae Brief is being lodged with the Clerk of this Court.

A copy of Moving Party's four page letter of request for consent with 8 pages of attachments, pursuant to **Rule 37(3)** was faxed to the Appellees on Wednesday, February 12, 1997 (see copy of letter at **Appendix 1** herein). The last paragraph on page 4 reads:

> " A motion to file an out of time brief amicus curiae under **U.S. Supreme Court Rule 37(3)(c)** with brief attached and the reasons for granting the same will be filed some time during the week of

> February 9-13, approximately a week in advance of the date upon which Appellee A.C.L.U.'s reply brief will be due (February 20, 1997). The amicus curiae brief (in support of neither party) will be limited to the above argument, which is framed in this letter, i.e., the suggestion that the judgment below should be reversed upon the principle of law ("variable obscenity" standard) applied in ***Ginzburg v. U.S.***, supra, which is not discussed in the Brief for the Appellants or the Amicus Curiae Brief of the National Law Center for Children and Families (which were due on or about January 20, 1997. (My emphasis.)"

On the following day, Thursday, February 13, 1997, both Appellees responded with a fax letter refusing to grant their consent, which refusal was 8 days before their Reply Brief was due (a copy of Appellees' refusal to consent appears herein at **Appendix 2** and the originals are being filed with the Clerk of this Court.).

A substantive Rule of Law of the magnitude of Judge Learned Hand's (father of the federal obscenity law) "variable obscenity" principles should not be so easily avoided by a mere procedural rule of the nature of **Rule 37(3)(a)**. For all the above reasons, Moving Party's motion for leave to file a Brief Amicus Curiae out of time should be granted.

Dated: February 17, 1997

Respectfully submitted,

James J. Clancy
Counsel for Moving Party.

No. 96-511

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of the United States, et al., ***Appellants***

v.

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February 17, 1997

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No. 96-511

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BRIEF AMICUS CURIAE OF JAMES J. CLANCY (MEMBER OF THE SUPREME COURT BAR) SUGGESTING REVERSAL OF THE JUDGMENT FOR A.C.L.U, ET AL., APPELLEES UPON THE AUTHORITY OF *RALPH GINZBURG v. U.S.*, 383 U.S. 463 (1966) AND JUDGE LEARNED HAND'S "VARIABLE OBSCENITY" PRINCIPLES.

This Amicus Curiae Brief in Support of neither Appellants nor Appellees is being filed pursuant to **Rule 37(3)(b)**, and suggests a reversal of the judgment for Appellees, A.C.L.U., et al., upon the authority of ***Ralph Ginzburg, et al. v. U.S.***, 383 U.S. 463, 16 L.Ed.2d 536, 86 S.Ct. 942; rehearing denied, 384 U.S. 934, 16 L.Ed.2d 536, 86 S.Ct. 1440 (March 21, 1966) and the "variable obscenity" principles established by Judge Learned Hand in ***U.S. v. Levine***, 83 F.2d 156 (2nd Cir., 1936) and ***U.S. v. Rebhuhn***, 109 F.2d 512, 514 (2nd Cir., 1946), certiorari

denied in 310 U.S. 629, 84 L.Ed. 1899, 60 S.Ct. 971. Written consent of the parties was requested by fax on February 12, 1997, see **Appendix 1**. On February 13, 1997, both Appellee A.C.L.U. and Appellee A.L.A. refused consent by fax letter. See copy of letters at **Appendix 2**, herein.

INTEREST OF AMICUS CURIAE

Amicus Curiae James J. Clancy is a Los Angeles Attorney admitted to practice in this Court in 1962. Since that time, Attorney Clancy has filed a number of Amicus Curiae and appellate briefs in this Court in obscenity litigation. A list of 56 of these cases filed during the 27 year period from 1963-1990 is set forth at **Appendix 3** herein. One of these cases was the landmark case of ***Ralph Ginzburg, et al. v. U.S.***, 383 U.S. 463 (1966).

I. BACKGROUND TO THIS COURT'S DECISION IN *RALPH GINZBURG v. U.S.*

In his 1936 decision in ***U.S v. Levine***, 83 F.2d 156 (2nd Cir., 1936), Judge Learned Hand introduced the concept of "variable obscenity" which, in conjunction with his 1934 decision in ***U.S. v. One Book Entitled Ulysses***, 73 F.2d 105 (2nd Cir., 1934), had the effect of changing the federal law on obscenity. In ***U.S. v. Levine***, supra, Judge Learned Hand (often regarded as the "father" of the modern obscenity statutes) explained the legal theory of "variable obscenity" as follows:

> ". . . Obscenity is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premise, but really a small bit of legislation ad hoc,

> like the standard of care. . ."
>
> " The standard must be the likelihood that the work will so much arouse the salacity of the reader to whom it is sent as to outweigh any literary, scientific or other merits it may have in that reader's hands; of this the jury is the arbiter." (Our emphasis).

Both the 1934 civil decision (injunction) in ***Ulysses***, supra, and the obscenity crime (see ***Rosen v. U.S.***, 161 U.S. 29 [1896] which required only a subjective "knowledge of the contents") involved "obscenity in the abstract" (obscenity vel non).

During the period 1936-1966, the "practice" in the lower federal courts began to develop a new obscenity crime— the so called "pandering" obscenity crime which did not require proof of obscenity in the abstract (obscenity vel non) and, instead, required a mens rea (scienter) requirement which became known as "pandering" obscenity. See ***U.S. v. Levine***, 83 F.2d 156 (2nd Cir., 1936); ***Burstein v. U.S.***, 178 F.2d 665 (9th Cir., 1949); ***U.S. v. Rebhuhn***, 109 F.2d 512, 514 (2nd Cir., 1940), certiorari denied 310 U.S. 629, 84 L.Ed. 1899, 60 S.Ct. 971.

In the ***Ralph Ginzburg v. U.S.***, supra, litigation, the U.S. Attorney in the trial court had tried his case upon the "pandering" concept and the record on appeal reflected that fact.

In his Brief for the Respondent on appeal, the Solicitor General did not argue the "variable" obscenity "pandering" concept, and instead, focused upon the "obscenity in the abstract" (obscene vel non) and "redeeming social importance" concepts.

In November of 1965, Moving Party herein (Attorney James J. Clancy) appeared in this Court in ***Ralph Ginzburg v. U.S.***, No. 42 and filed a 77 page Brief Amicus

Curiae as Counsel of Record for Amicus Curiae Citizens for Decent Literature, Inc., an Ohio Corporation in support of the Respondent United States of America and, as an Amicus Curiae, argued the variable obscenity "pandering" concept upon which the case had been tried. See copy of Brief Amicus Curiae of Citizens for Decent Literature, Inc., at **Appendix 4** herein at pages 61-62, 66-68 and 69-77.

In his Reply Brief, Appellant Ralph Ginzburg referred to the Solicitor General's Response Brief as having conceded the fact that the subject matter was not obscene. When the Solicitor General did not reply to Ginzburg's claim of a "concession", Attorney James J. Clancy as Counsel of Record for Amicus Curiae Citizens for Decent Literature, Inc. prepared a reply brief, carried the same to Washington, D.C. on the day before oral argument in ***Ralph Ginzburg v. U.S.***, supra, had it printed by Byron S. Adams, Washington, D.C. as a Reply Brief and filed the same with the Clerk of the U.S. Supreme Court on the day of oral argument in the ***Ginzburg*** 1966 case. The Clerk of this Court received and filed the same before oral argument in the ***Ginzburg*** case (in 1966, there was no Rule of Court or decision of this Court which precluded the filing of a Reply Brief by an Amicus Curiae. Compare in this regard, **Rule 37(3)(a)** of the 1995 Revised Rules of the U.S. Supreme Court which precludes the filing of a Reply Brief by an Amicus Curiae). A copy of Attorney Clancy's Reply Brief in ***Ginzburg*** is attached as **Appendix 5** herein.

In responding to Ginzburg's Reply Brief (which claimed a concession by the Solicitor General), the Citizens for Decent Literature, Inc. Amicus Curiae Reply Brief at page 4 footnote 9, cited ***U.S. v. Rebhuhn***, supra, as a "pandering" case which had been tried under the "pandering" concept, and in which a petition for writ of

certiorari had been filed in this Court and denied by this Court.

Associate Justice Brennan's Majority Opinion for this Court in the 1966 ***Ginzburg*** decision relied upon the ***U.S. v Rebhuhn***, supra, (certiorari denied) decision and thus upheld on the "merits" (for the first time) the "pandering" obscenity crime. Although the decision was 5-4, one could construe it as a 6-3 decision, in as much as Justice Harlan's separate decision indicated that he would have voted with Justice Brennan and the majority, had the majority agreed to return the case to the trial court for a retrial under the (new) "pandering" concept. See ***Ralph Ginzburg v. U.S.***, 383 U.S. 495-496. The conclusion that must be drawn from Justice Harlan's remarks at pages 495-497 is that the word "obscene"(or "lewd" or "lascivious" or "indecent" or "filthy" or "vile"), used in a statutory scheme, is not susceptible to a facial attack where it is clear that the term is used with regard to "pandering" and equivalent anti-social conduct to satisfy the "mens rea" element of the statute.

Moving Party contends that, although the "pandering" concept and "pandering" crime had been subject to attack: (1) when Ginzburg was tried , and (2) on appeal in the U.S. Supreme Court prior to this Court's decision on March 21, 1966 in ***Ginzburg*** (upon the theory that this Court's "certiorari denied" decision in ***U.S. v. Rebhuhn***, supra, was not precedent and this Court had not, as yet, passed upon that concept); nevertheless, upon the filing of the 1966 ***Ginzburg*** decision which upheld Ginzburg's conviction on that theory, the "pandering" concept became the law of the land. The jurisdictional questions in this appeal (No. 96-511) which are limited to a facial attack on the new legislation, therefore must be examined in the light of the ***Ginzburg*** "variable obscenity" decision.

STATEMENT OF THE CASE

The four jurisdictional questions in the Jurisdictional Statement in ***Reno v. A.C.L.U.***, No. 96-511 present a narrow issue as to whether each of the sections of the **"Communication Decency Act of 1996"** ("C.D.A.") which is under attack, "is unconstitutional on its face". The three Judge U.S. District Court below upheld the challenge of the A.C.L.U. on that narrow ground and granted a preliminary injunction.

SUMMARY OF ARGUMENT

The suggestion that: ". . . this speech at issue, whether denominated 'indecent' or 'patently offensive' is entitled to constitutional protection. . .", see ***A.C.L.U. v. Reno***, 929 F.Supp. 824 at 851 (1996), is clearly erroneous. There is no unrestricted **First Amendment** Constitutional Right to use "indecent speech" or "talk dirty" or "pander to the prurient interest" or engage in anti social conduct which "constitutes an appeal to the prurient interest". See ***Ralph Ginzburg, et al. v. U.S.***, 383 U.S. 463 (1966).

This Court's 5-4 majority decision in ***Ralph Ginzburg, et al. v. U.S.***, supra, established Judge Learned Hand's bifurcated view of the federal obscenity law (**18 U.S.C. §1461**) in ***U.S. v. Levine***, supra, and ***U.S. v. Rebhuhn***, supra, as a correct interpretation of the federal law on "obscenity". Accordingly, it is now the Law of the Land.

The statutory sections of the **Communications Decency Act of 1996** under attack do not "ban" anything: they are criminal statutes which are designed to be applied

to anti social "conduct" which Congress has declared to be unlawful with respect to (1) the conduct of the citizens of the United States with respect to "obscenity" in their use of the "global internet", and (2) the duties and obligations of the United States as a signatory member of the International Treaty which proscribes "obscenity". See ***Roth v. U.S.***, 354 U.S. 476, 485 at footnote 15. The criminal sanctions are to be applied to the facts **after** the unlawful conduct has been engaged in.

In a criminal case involving "obscenity in the abstract" (obscenity vel non), the fact finder focuses on the definition of "obscene" and the subject matter, and determines that it is or is not obscene under all circumstances and then, if determined to be obscene in the abstract, finds the defendant to be guilty if the fact finder determines that the defendant had knowledge of what the subject matter contained, i.e., the contents of the subject matter. One of the tests to be applied in determining obscenity vel non is: "whether all reasonable persons would agree and conclude that the subject matter is "obscene in the abstract" as that term is defined by law". ***Rosen v. U.S.***, 161 U.S. 606 (1896). In a criminal case involving "variable obscenity", the fact finder does not focus exclusively upon the definition of "obscene", but rather upon the conduct of the defendant and all the surrounding circumstances and then returns a verdict of guilty if the defendant's conduct in relation to the subject matter constituted "pandering obscenity" as defined by the Court. By its very nature, a complaint charging "pandering obscenity" is not subject to a facial attack on the definition of "obscene" because the complaint can be constitutionally applied to "pandering to the prurient interest" conduct (a specific set of facts, which establish the "mens rea" and unlawful conduct), ***Ralph Ginzburg, et al. v. U.S.***, 383 U.S. 463, 474, at footnote 19.

ARGUMENT

The ***Reno v. A.C.L.U.*** trial court was in error and should have held that, under the "variable obscenity" principles approved by the U.S. Supreme Court in ***Ginzburg, et al. v. U.S.***, supra, the terms "obscene", "indecent", "patently offensive as measured by community standards", and "sexual or excretory activities or organs", as used in the **Communications Decency Act of 1996** are not subject to attack under ***Dombrowski v. Pfister***, 380 U.S. 479 (see ***Ginzburg***, supra , at pages 40 and 41, footnote 19):

> "19. One who advertises and sells a work on the basis of its prurient appeal is not threatened by the perhaps inherent residual vagueness of the **Roth** test, cf. ***Dombrowski v Pfister***, 380 U.S. 479, 486-487, 491-492, 14 L ed 2d 22, 28, 31, 85 S.Ct. 1116; such behavior is central to the objectives of criminal obscenity laws. A.L.I. Model Penal Code, Tentative Draft No. 6 (May 6, 1957), pp. 1-3, 13-17; Comments to the Proposed Official Draft §251.4, supra; Schwartz, Morals Offenses and the Model Penal Code, 63 Col.L.Rev. 669, 677-681 (1963); Paul & Schwartz, Federal Censorship--Obscenity in the Mail, 212-219 (1961); see ***Mishkin v New York***, 383 US 502 at 507, note 5, 16 L.Ed 2d 56, at 61, 86 S.Ct. 958."

See also Justice Harlan's dissent at pages 495-497, wherein he discusses what the government's burden of proof would be as to the terms "obscene", etc., as used in **18 U.S.C. §1461**, if the case were to be retried in the U.S. District Court under a "pandering variable obscenity"

theory (in which event, his vote would have given ***Ginzburg*** a majority vote of 6-3):

> " If there is anything to this new pandering dimension to the mailing statute, the Court should return the case for a new trial, for petitioners are at least entitled to a day in court on the question on which their guilt has ultimately come to depend. Compare the action of the Court in ***Memoirs v Massachusetts***, 383 U.S. 413, 16 L Ed 2d 1, 86 S.Ct 975, where the Court affords the State an opportunity to prove in a subsequent prosecution that an accused purveyor of Fanny Hill in fact used pandering methods to secure distribution of the book."
>
> " If a new trial were given in the present case, as I read the Court's opinion, the burden would be on the Government to show that the motives of the defendants were to pander to 'the widespread weakness for titillation by pornography' (ante, p. 38). I suppose that an analysis of the type of individuals receiving Eros and the Handbook would be relevant. If they were ordinary people, interested in purchasing Eros or the Handbook for one of a dozen personal reasons, this might be some evidence of pandering to the general public. On the other hand, as the Court suggests, the defendants could exonerate themselves by showing that they sent these works only or perhaps primarily (no standards are set) to psychiatrists and other serious-minded professional people. Also relevant would apparently be the nature of the mailer's advertisements or representations. Conceivably someone mailing to the public selective portions of

a recognized classic with the avowed purpose of titillation would run the risk of conviction for mailing non-mailable matter. Presumably the Post Office under this theory might once again attempt to ban Lady Chatterley's Lover, which a lower court found not bannable in 1960 by an abstract application of Roth. ***Grove Press, Inc. v Christenberry***, 276 F.2d 433. I would suppose that if the Government could show that Grove Press is pandering to people who are interested in the book's sexual passages and not in D. H. Lawrence's social theories or literary technique §1461 could properly be invoked. Even the well-known opinions of Judge A. N. Hand in ***United States v One Book Entitled Ulysses***, 72 F2d 705, and of Judge Woolsey in the District Court, 5 F.Supp. 182, might be rendered nugatory if a mailer of Ulysses is found to be titillating readers with its 'coarse, blasphemous, and obscene' portions, 72 F.2d, at 707, rather than piloting them through the intricacies of Joyce's stream of consciousness."

Each of the challenged sections in such act is susceptible of a constitutional construction, in that such sections of the **Communications Decency Act of 1996** do nothing more than proscribe a type of anti social "conduct" under federal "variable obscenity" standards which is of the same nature as that under which Ralph Ginzburg was indicted, convicted and sentenced to a five year jail term, see ***Ginzburg***, supra at page 39 and footnote 14 and 15, citing the **Proposed Official Draft of the A.L.I. Model Penal Code**:

"14. The Proposed Official Draft of the A.L.I. Model Penal Code likewise recognizes the question of pandering as relevant to the obscenity issue, §251.4(4); Tentative Draft No. 6 (May 6, 1957), pp. 1-3, 13-17, 46-46, 53; Schwartz, supra, n. 12; see Craig, Suppressed Books, 195-206 (1963). Compare ***Grove Press, Inc. v. Christenberry***, 176 F.Supp. 488, 496-497 (D.C.S.D., N.Y. 1959), affd. 276 F.2d 433 (C.A., 2nd Cir., 1960); ***United States v One Book Entitled Ulysses***, 72 F.2d 705, 707 (C.A., 2nd Cir., 1934), affirming 5 F.Supp. 182 (D.C.S.D., N.Y. 1933). See also The Trial of Lady Chatterly-- Regina v Penguin Books, Ltd. (Rolph ed. 1961).

"15. Our conclusion is consistent with the statutory scheme. Although §1461, in referring to 'obscene . . . matter' may appear to deal with the qualities of material in the abstract, it is settled that the mode of distribution may be a significant part in the determination of the obscenity of the material involved. ***United States v Rebhuhn***, supra. Because the statute creates a criminal remedy, cf. ***Manual Enterprises v Day***, 370 U.S. 478, 495, 8 L.Ed.2d 639, 651, 82 S.Ct. 1432 (opinion of Brennan, J.), it readily admits such an interpretation, compare ***United States v 31 Photographs, etc.***, 156 F.Supp. 350 (D.C.S.D., N.Y. 1957)."

The "variable obscenity" factors set forth in the **Communications Decency Act of 1996** are the functional equivalent of the "variable obscenity" factors discussed and applied in ***Ginzburg***, supra. See ***U.S. v. Rebhuhn***,109 F.2d 512, certiorari denied 310 U.S. 629, 84 L.Ed 1399, 60

S.Ct. 976, relied upon in ***Ginzburg***, supra, at pages 472-474, reading as follows:

> " The decision in ***United States v Rebhuhn***, 109 F.2d 512, is persuasive authority for our conclusion.14/. That was a prosecution under the predecessor to §1461, brought in the context of pandering of publications assumed useful to scholars and members of learned professions. The books involved were written by authors proved in many instances to have been men of scientific standing, as anthropologists or psychiatrists. The Court of Appeals for the Second Circuit therefore assumed that many of the books were entitled to the protection of the First Amendment, and 'could lawfully have passed through the mails, if directed to those who would be likely to use them for the purposes for which they were written . . .' 109 F.2d, at 514. But the evidence, as here, was that the defendants had not disseminated them for their 'proper use, but . . . woefully misused them, and it was that misuse which constituted the gravamen of the crime.' Id., at 515. Speaking for the Court in affirming the conviction, Judge Learned Hand said:
>
> '. . . [T]he works themselves had a place, though a limited one, in anthropology and in psychotherapy. They might also have been lawfully sold to laymen who wished seriously to study the sexual practices of savage or barbarous peoples, or sexual aberrations; in other words, most of them were not obscene per se. In several decisions we have held that the statute does

> not in all circumstances forbid the dissemination of such publications. . . : However, in the case at bar, the prosecution succeeded . . . when it showed that the defendants had indiscriminately flooded the mails with advertisements, plainly designed merely to catch the prurient, though under the guise of distributing works of scientific or literary merit. We do not mean that the distributor of such works is charged with a duty to insure that they shall reach only proper hands, nor need we say what care he must use, for these defendants exceeded any possible limit; the circulars were no more than appeals to the salaciously disposed, and no [fact finder] could have failed to pierce the fragile screen, set up to cover that purpose.' 109 F2d, at 514-515."

" We perceive no threat to First Amendment guarantees in thus holding that in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the Roth test.15/ No weight is ascribed to the fact that petitioners have profited from the sale of publications which we have assumed but do not hold cannot themselves be adjudged obscene in the abstract; to sanction consideration of this fact might indeed induce self-censorship, and offend the frequently stated principle that commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment.16/ Rather, the fact that each of these publications was created or exploited entirely on the

basis of its appeal to prurient interests 17/ strengthens the conclusion that the transactions here were sales of illicit merchandise, not sales of constitutionally protected matter.18/ A conviction for mailing obscene publications, but explained in part by the presence of this element, does not necessarily suppress the materials in question, nor chill their proper distribution for a proper use. Nor should it inhibit the enterprise of others seeking through serious endeavor to advance human knowledge or understanding in science, literature, or art. All that will have been determined is that questionable publications are obscene in a context which brands them as obscene as that term is defined in Roth-- a use inconsistent with any claim to the shelter of the First Amendment.19/. 'The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting.' ***Roth v United States***, 354 U.S., at 495, 1 L.Ed 2d at 1513. (Warren, C. J., concurring.)"

" It is important to stress that this analysis simply elaborates the test by which the obscenity vel non of the material must be judged. Where an exploitation of interests in titillation by pornography is shown with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters, such evidence may support the determination that the material is obscene even though in other contexts the material would escape such condemnation."

" Petitioners raise several procedural objections,

principally directed to the findings which accompanied the trial court's memorandum opinion, Fed. Rules Crim. Proc. 23. Even on the assumption that petitioners' objections are well taken, we perceive no error affecting their substantial rights."

" Affirmed."

Ralph Ginzburg's claim of a constitutional right to "pander" was rejected by the U.S. Supreme Court, see the opinion of Justice Brennan in his review of the trial facts at: (1) pages 35, footnotes 5 and 6; (2) page 36, footnote 8; (3) page 37, footnotes 9 and 11; (4) Judge Learned Hand speaking in ***U.S. v. Rebhuhn***, 109 F.2d 512, cited at page 39 and footnotes 13 and 14; (5) page 40 at footnote 15, citing ***U.S. v. Rebhuhn***, supra; (6) text at pages 40 and 41, and footnote 19 at pages 40 and 41, distinguishing the **Roth Test** for obscenity from ***Dombrowski v. Pfister***, 380 U.S. 479, 486-487, 491-492,14 L.Ed.2d 22, 28-31; 85 S.Ct. 1116; and **A.L.I. Model Penal Code Tentative Draft No. 6** (May 6,1957) pages 1-3, 13-57, Comments to the Proposed Official Draft, §251.4, supra; ***Schwartz***, **Morals Offenses and the Model Penal Code**, 63 Col.L.Rev. 669, 677-681 (1963):

"5. Our affirmance of the convictions for mailing EROS and Liaison is based upon their characteristics as a whole, including their editorial formats, and not upon particular articles contained, digested, or excerpted in them. Thus we do not decide whether particular articles, for example, in EROS, although identified by the trial judge as offensive, should be condemned as obscene whatever their setting. Similarly, we accept the

Government's concession note 13, infra, that the prosecution rested upon the manner in which the petitioners sold the Handbook; thus our affirmance implies no agreement with the trial judge's characterizations of the book outside that setting."

"6. It is suggested in dissent that petitioners were unaware that the record being established could be used in support of such an approach, and that petitioners should be afforded the opportunity of a new trial. However, the trial transcript clearly reveals that at several points the Government announced its theory that made the mode of distribution relevant to the determination of obscenity, and the trial court admitted evidence, otherwise irrelevant, toward that end."

"8. Evidence relating to petitioners' efforts to secure mailing privileges from these post offices was, contrary to the suggestion of Mr. Justice Harlan in dissent, introduced far the purpose of supporting such a finding. Scienter had been stipulated prior to trial. The Government's position was revealed in the following colloquy, which occurred when it sought to introduce a letter to the postmaster of Blue Ball, Pennsylvania:

> 'The COURT. Who signed the letter?
> 'Mr. CREAMER. It is signed by Frank R. Brady, Associate Publisher of Mr. Ginzburg. It is on Eros Magazine, Incorporated's stationery.
> 'The COURT. And your objection is-
> 'Mr. SHAPIRO. It is in no way relevant to

> the particular issue or publication upon which the defendant has been indicted and in my view, even if there was an identification with respect to a particular issue, it would be of doubtful relevance in that event.
> 'The COURT. Anything else to say?
> 'Mr. CREAMER. If Your Honor pleases, there is a statement in this letter indicating that it would be advantageous to this publication to have it disseminated through Blue Ball, Pennsylvania, post office. I think this clearly goes to intent, as to what the purpose of publishing these magazines was. At least, it clearly establishes one of the reasons why they were disseminating this material.
> 'The COURT. Admitted.' "

"9. Thus, one EROS advertisement claimed:

> 'Eros is a child of its times. . . .[It] is the result of recent court decisions that have realistically interpreted America's obscenity laws and that have given to this country a new breadth of freedom of expression. . . . EROS takes full advantage of this new freedom of expression. It is the magazine of sexual candor.'

"In another, more lavish spread:

> 'EROS is a new quarterly devoted to the subjects of Love and Sex. In the few short weeks since its birth, EROS has established itself as the rave of the American intellectual

community-- and the rage of prudes everywhere! And it's no wonder: EROS handles the subjects of Love and Sex with complete candor. The publication of this magazine-which is frankly and avowedly concerned with erotica-- has been enabled by recent court decisions ruling that a literary piece or painting, though explicitly sexual in content has a right to be published if it is a genuine work of art.

'EROS is a genuine work of art. . . .'

"An undisclosed number of advertisements for Liaison were mailed. The outer envelopes of these ads ask, 'Are you among the chosen few?' The first line of the advertisement eliminates the ambiguity: 'Are you a member of the sexual elite?' It continues:

'That is, are you among the few happy and enlightened individuals who believe that a man and woman can make love without feeling pangs of conscience? Can you read about love and sex and discuss them without blushing and stammering?

'If so, you ought to know about an important new periodical called Liaison.

. . . .

..

'In short, Liaison is Cupid's Chronicle. . . .

'Though Liaison handles the subjects of love and sex with complete candor, I wish to make it clear that it is not a scandal sheet and it is not written for the man in the street. Liaison is aimed at intelligent, educated adults who can accept love and sex as part of

life.

'. . . I'll venture to say that after you've read your first bi-weekly issue, Liaison will be your most eagerly awaited piece of mail.' "

"11. There is much additional evidence supporting the conclusion of petitioners' pandering. One of petitioners' former writers for Liaison, for example, testified about the editorial goals and practices of that publication."

"12. Schwartz, Morals Offenses and the Model Penal Code, 63 Col.L.Rev. 669, 677 (1963).

"13. The Government drew a distinction between the author's and petitioners' solicitation. At the sentencing proceeding the United States Attorney stated:

'. . . [the author] was distributing. . . only to physicians; she never had widespread, indiscriminate distribution of the Handbook, and, consequently, the Post Office Department did not interfere . . . . If Mr. Ginzburg had distributed and sold and advertised these books solely to . . . physicians . . . we, of course, would not be here this morning with regard to The Housewife's Handbook . . . .' "

Federal Statutes (such as the C.D.A.) which regulate anti social conduct, i.e., the dissemination of "obscenity", "indecency", etc. (on the basis of its "prurient interest") which include a specific mens rea element are not subject to a facial attack on the basis of "overbreath". Because the

Communications Decency Act of 1996 includes a specific "mens rea" element, the only behavior (by statutory definition) which falls within the ambit of the statute is behavior (anti social conduct) which is capable of being Constitutionally proscribed. The inclusion of the specific "mens rea" element provides the requisite Constitutional specificity and "narrows" the construction of the statute, confining its application to only Constitutionally permissible situations, i.e., anti social conduct involving "pandering", "talking dirty", etc., in front of minors. The use of a specific "mens rea" element has long been recognized as being central to the objectives of criminal obscenity laws and where present, such laws may only be challenged on an "as applied basis". Where the standards ("variable obscenity" factors) are not misconceived, the only serious question is whether those standards were correctly applied "to the trial facts". See, ***Ralph Ginzburg, et al. v. U.S.***, 383 U.S. 463,16 L.Ed.2d 31 at 35 and at pages 40-41, footnote 19, 86 S.Ct. 942.

Similarly, there is no unrestricted Constitutional right to engage in anti social conduct involving "indecency" or "indecent speech" in front of minors in view of the fact that computer systems will soon be available to all minors as an educational tool, and that minors must be regarded as a foreseeable "target" audience for all free access communications currently taking place on the Internet. See, in this regard, President Clinton's remarks on February 4,1997, in his State of the Union Address:

> ". . . Let's work together to meet these . . . goals: . . . every 12-year-old must be able to log on to the Internet. . ."

and President Clinton's weekly Radio Address remarks on February 8,1997:

> ". . . To give our children the best education we must help them to harness the powerful forces of technology. That's why we've challenged America to connect every classroom and library to the Internet by the year 2000. For the first time in history, children in the most isolated rural towns, the most comfortable suburbs, and the poorest inner-city schools will have the same access to the same universe of knowledge. . ."

and:

> ". . . By doubling our investment in education technology, by dramatically lowering the Internet rates for schools and libraries, by mobilizing Americans all across the country to help wire our schools, we will meet our goal of connecting every classroom and library to the Information Superhighway by the year 2000. That's how we must prepare our children for the 21st Century, with the full promise of the Information Age at their fingertips. And it's an important way to give our children the world's best education and the chance to make the most of their own lives. . . .").

Further, an overbreath argument which is grounded upon an asserted claim of an unrestricted "constitutional right" to engage in a specific type of "conduct", i.e., to "talk dirty" or to "indecent speech" or "indecency" (see ***Shea v.Reno***, 930 F.Supp. 916 at 922-933 [U.S. District Court, S.D.N.Y.,1996]: ". . . that §223(d) would serve as a ban on

constitutionally protected indecent communications between adults. . ." [my emphasis.]) is as meritless as the "constitutional right to pander" which was asserted but rejected in ***Ginzburg v. U.S.***, supra. See, in this regard, the eight (8) images obtained from current **free access** web sites located by using the Internet Search Engines "Yahoo" and "Alta Vista" (available to any 12-year old) using the locator request **"Adult Bookstore"**, which are reproduced at Appendix 1 herein as an attachment to the letter dated February 12, 1997, requesting the consent to file an amicus curiae brief. In the judgment of amicus curiae James J. Clancy, such images are in violation of the "variable obscenity" standards of both the **Communications Decency Act of 1996** and ***Ginzburg v. U.S.***, supra.

CONCLUSION

The judgment of the 3 Judge U.S. District Court that the challenged sections of the **Communications Decency Act of 1996** are facially unconstitutional should be reversed upon the "variable obscenity" standards expressed in Associate Justice Brennan's majority opinion in ***Ralph Ginzburg v. U.S.***, supra and the "variable obscenity" principles expressed by Judge Learned Hand in his opinions in ***U.S. v. Levine***, supra and ***U.S. v. Rebhuhn***, supra, as codified in the **A.L.I. Model Penal Code, Tentative Draft No. 6** (May 6, 1957) and the **Comments to the Proposed Official Draft §251.4.** See also *Schwartz*, **Morals Offenses and the Model Penal Code**, 63 Col.L.Rev. 669, 677-681 (1963).

The narrow configuration of this case, and the opportunity and the ability of this Court to decide the jurisdictional questions posed in this appeal by a summary reversal based upon Justice Brennan's majority opinion in

Ralph Ginzburg, et al. v. U.S., supra, affords this Court a unique opportunity— the first in 40 years— to revisit Judge Learned Hand's well reasoned opinions on obscenity and this Court's landmark decision in ***Roth v. U.S.***, 354 U.S. 476, 1 L.Ed.2d 1408, 77 S.Ct. 1314 (1957) and restore simplicity to this nation's federal obscenity statutes by reconsidering and reconciling the seemingly conflicting views of the individual Justices on this Court during those 40 years.

If this Court were to seize this unique opportunity, the following objectives and reconsideration would be worthy of consideration:

1. Reaffirm the opinions of Judge Learned Hand in ***U.S. v. Levine***, 83 F.2d 156 and ***U.S. v. Rebhuhn***, 109 F.2d 512, 514 in their entirety as a correct statement of the federal obscenity law before *Ginzburg* and Judge Hand's bifurcated view of the federal obscenity law (variable obscenity) as a correct statement of the law before and after the *Ginzburg* decision and a correct statement of the "Law of the Land" after the filing of the 5-4 *Ginzburg* Opinion (perhaps 6-3, if Justice Harlan's dissent is viewed as a "concession").

2. Reaffirm in their entirety this Court's decisions in ***Roth v. U.S.***, supra and ***Ralph Ginzburg v. U.S.***, supra (with minor adjustments and modifications as explained hereinafter).

3. Reaffirm the ***Roth-Alberts*** definition of

"appeal to the prurient interest" as an "excessive, unnatural and unlawful" interest rather than a natural, healthy and lawful interest in sex.

4. Reaffirm the law expressed in ***Roth-Alberts*** that the mens rea for the crime of dealing with "obscenity in the abstract" (obscenity vel non) is "knowledge of the contents" and does not require a person's subjective perception as to whether the subject matter is or is not obscene. See ***Rosen v. U.S.***, 161 U.S. 606 (1896).

5. Establish as one of the tests for "obscenity in the abstract": "whether all reasonable persons would agree and conclude that the subject matter is 'obscene in the abstract' as that term is defined by law (which appears to be the equivalent of Justice Harlan's and Justice Stewart's use of the term'hard core pornography')".

6. Reaffirm Justice Brennan's opinion in ***Ralph Ginzburg v. U.S.***, supra, as a correct statement of the difference between the bifurcated crimes of "obscenity in the abstract" and "pandering obscenity" and (reconciling and equating) Justice Warren's opinion on "conduct" to be a consistent statement with respect to the bifurcated "pandering crime" and Justice Harlan's and Justice Stewart's views on "hard core pornography" to be a consistent statement

treating the bifurcated "obscenity in the abstract" crime, and the law as to "specificity" expressed in ***Miller v. California***, 413 U.S. 15 (1973), to be a consistent statement treating the "obscenity in the abstract" crime..

7. Reconcile Justice Harlan's and Justice Stewart's separate opinions re "hard core pornography" in ***Ralph Ginzburg v. U.S.***, supra, with Judge Hands ruling on "obscenity in the abstract" with an explanation that their separate opinions in ***Ginzburg*** were proper (at the time ***Ginzburg*** was argued and incident to the reporting of the 5-4 landmark ruling) inasmuch as such was not the Law of the Land until ***Ginzburg*** was decided.

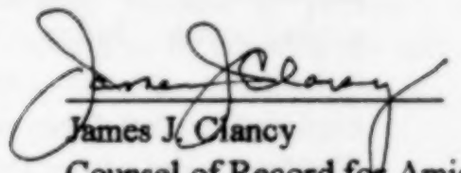
8. Adoption of Justice Harlan's view with respect to this Court's limited role in reviewing state determinations of obscenity under the 10th and 11th Amendments.

The practical end result of a reexamination of the federal law of obscenity at this time and reconciliation of the above propositions of law would be both historic and "meteoric". For example, by reaffirming Judge Learned Hand's bifurcation of the law and reaffirming the law expressed in ***Rosen v. U.S.***, supra, as controlling the crime of dealing with "obscenity in the abstract", that segment of the pornography industry holding millions of dollars in hard core videotape inventories would, overnight, find themselves holding assets which had a value of zero and

were unmarketable in the United States. Further, such a determination would help to terminate the runaway production and exhibition on Cable and Satellite T.V. of hard core pornographic films that now exists. (See U.S. News and World Report, dated February 10, 1997.

DATED: February 17, 1997

Respectfully submitted,



James J. Clancy
Counsel of Record for Amicus Curiae

APPENDIX 1

COPY OF ATTORNEY JAMES J. CLANCY'S 4 PAGE LETTER OF REQUEST FOR CONSENT TO FILE AN AMICUS CURIAE BRIEF, WITH 8 PAGES OF ATTACHMENTS IN ***RENO V. A.C.L.U., ET AL.***, U.S. SUPREME COURT NO. 96-511, FAXED TO APPELLANTS ON FEBRUARY 12, 1997.

Reference: (1) Motion For Leave To File An Out Of Time Amicus Curiae Brief In ***Reno v. A.C.L.U., Et Al.***, U.S. Supreme Court No. 96-511, Under Rule 37(3)(b) With Attached Brief Amicus Curiae Of James J. Clancy (Member Of The Supreme Court Bar) At **Page 4**.

Reference: (2) Brief Amicus Curiae Of James J. Clancy In ***Reno v. A.C.L.U., Et Al.***, U.S. Supreme Court No. 96-511 At **Page 2**

JAMES J. CLANCY
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February 12,1997

Christopher A. Hansen, Esq.
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036

Re: Request for consent to file a brief for Amicus Curiae James J. Clancy in ***Reno v. A.C.L.U.***, No. 96-511, suggesting a simple reversal of the Three Judge District Court Judgment below upon the "variable obscenity" factors upheld in ***Ralph Ginzburg, et al. v. U.S.***, 383 U.S. 463, 16 L.Ed.2d 31, 86 S.Ct. 942, rehearing denied 384 U.S. 934,16 L.Ed2d 536, 86 S.Ct.1440 (3/21/66) (interpreting **18 U.S.C. §1461**): (criminal law requirements: ***Ginzburg***, footnotes 13,14 and 15; "pandering" concept: ***Ginzburg***, footnote 14; "prurient" appeal: ***Ginzburg***, footnote 19).

Dear Mr. Hansen;

I respectfully request your consent for Appellees, the **American Civil Liberties Union, et al.**, to the filing of a brief for James J. Clancy as amicus curiae in support of a simple reversal of the judgment below upon the

"variable obscenity" factors which were argued in the appellate briefs and upheld by the U.S. Supreme Court in ***Ralph Ginsburg, et al. v. U.S., 383 U.S.*** 463,16 L.Ed.2d 31, 86 S.Ct. 942, rehearing denied 384 U.S. 934, 16 L.Ed.2d 536, 86 S.Ct.1440 (3/21/66) (interpreting the term "obscene" as employed in **18 U.S.C.§1461**): (criminal law requirements: ***Ginzburg***, footnote 13,14 and 15; "pandering" concept: ***Ginzburg***, footnote 14; "prurient" appeal: ***Ginzburg***, footnote 19).

The four jurisdictional questions in the Jurisdictional Statement in ***Reno v. A.C.L.U.***, No. 96-511 present a narrow issue as to whether each of the sections of the **"Communication Decency Act of 1996"** ("C.D.A.") which is under attack, "is unconstitutional on its face". The three Judge U. S. District Court below upheld the challenge of the A.C.L.U. on that narrow ground and granted a preliminary injunction.

The amicus curiae brief for James J. Clancy will contend that the ***Reno v. A.C.L.U.*** trial court was in error and should have held that, under the "variable obscenity" principles approved by the U.S. Supreme Court in ***Ginzburg, et al. v. U.S.***, supra, the terms "obscene", "indecent", "patently offensive as measured by community standards", and "sexual or excretory activities or organs", as used in the **Communications Decency Act of 1996** are not subject to attack under ***Dombrowski v. Pfister***, 380 U.S. 479 (see ***Ginzburg***, supra, at pages 40 and 41, footnote 19)

Each of the challenged sections in such act is susceptible of a constitutional construction, in that such sections of the **Communications Decency Act of 1996** do nothing more than proscribe a type of "conduct" under federal "variable obscenity" standards which is of the same nature as that under which Ralph Ginzburg was indicted, convicted and sentenced to a five year jail term, see ***Ginzburg***, supra at page 39 and footnote 14, citing the **Proposed Official Draft of the A.L.I. Model Penal Code**. The "variable obscenity" factors set forth in the **Communications Decency Act of 1996** are the functional equivalent of the "variable obscenity" factors discussed and applied in ***Ginzburg***, supra. See, also, ***U.S. v. Rebhuhn***, 109 F.2d 512, cert. den. 310 U.S. 629, 84 L.Ed 1399, 60 S.Ct. 976, relied upon in ***Ginzburg***, supra, at pages 39 and 40, footnote 15.

Ralph Ginzburg's claim of a constitutional right to "pander" was rejected by the U.S. Supreme Court, see the opinion of Justice Brennan at: (1) pages 35, footnotes 5 and 6; (2) page 36, footnote 8; (3) page 37, footnotes 9 and 11; (4) Justice Learned Hand speaking in ***Rebhuhn v. U.S.***, 109 F.2d 512, cited at page 39 and footnotes 13 and 14; (5) page 40 at footnote 15, citing ***U.S. v. Rebhuhn***, supra; (6) text at pages 40 and 41, and footnote 19 at pages 40 and 41, distinguishing the **Roth Test** for obscenity from ***Dombrowski v. Pfister***, 380 U.S. 479, 486-487, 491-492,14 L.Ed.2d 22, 28-31; 85 S.Ct. 1116; and **A.L.I. Model Penal Code Tentative Draft No. 6** (May 6,1957) pages 1-3, 13-57, Comments to the Proposed Official Draft

§251.4, supra; *Schwartz*, **Morals Offenses and the Model Penal Code**, 63 Col.L.Rev. 669, 677-681 (1963).

Federal Statutes (such as the C.D.A.) regulating "obscenity", "indecency", etc. (on the basis of its "prurient interest") which include a specific mens rea element are not subject to a facial attack on the basis of "overbreath". Because the C.D.A. includes a specific "mens rea" element, the only behavior (by statutory definition) which falls within the ambit of the statute is behavior which is capable of being Constitutionally proscribed. The inclusion of the specific "mens rea" element provides the requisite Constitutional specificity and "narrows" the construction of the statute, confining its application to only Constitutionally permissible situations, i.e., "pandering", "talking dirty". The use of a specific "mens rea" element has long been recognized as being central to the objectives of criminal obscenity laws and where present, such laws may only be challenged on an "as applied basis". Where the standards ("variable obscenity" factors) are not misconceived, the only serious question is whether those standards were correctly applied "to the trial facts". See, ***Ralph Ginzburg, et al. v. U.S.***, 383 U.S. 463,16 L.Ed.2d 31 at 35 and at pages 40-41, footnote 19, 86 S.Ct. 942.

Similarly, there is no unrestricted Constitutional right to "indecency" or "indecent speech". In light of the fact that computer systems will soon be available to all minors as an educational tool, and that minors must be regarded as a foreseeable "target" audience for all free

access communications currently taking place on the Internet (see President Clinton's remarks on February 4,1997, in his State of the Union Address:

> ". . . Let's work together to meet these . . . goals: . . . every 12-year-old must be able to log on to the Internet. . .",

and President Clinton's weekly Radio Address remarks on February 8,1997:

> ". . . To give our children the best education we must help them to harness the powerful forces of technology. That's why we've challenged America to connect every classroom and library to the Internet by the year 2000. For the first time in history, children in the most isolated rural towns, the most comfortable suburbs, and the poorest inner-city schools will have the same access to the same universe of knowledge. . ."

and:

> ". . . By doubling our investment in education technology, by dramatically lowering the Internet rates for schools and libraries, by mobilizing Americans all across the country to help wire our schools, we will meet our goal of connecting every classroom and library to the Information Superhighway by the year 2000. That's how we

> must prepare our children for the 21st Century, with the full promise of the Information Age at their fingertips. And it's an important way to give our children the world's best education and the chance to make the most of their own lives. . . .''),

an overbreath argument which is grounded upon an asserted claim of an unrestricted "constitutional right to "talk dirty" or to "indecent speech" or "indecency" (see ***Shea v. Reno***, 930 F.Supp. 916 at 922-933 [U.S. District Court, S.D.N.Y., 1996]: ". . . that §223(d) would serve as a ban on constitutionally protected indecent communications between adults. . .") is as meritless as the "constitutional right to pander" which was asserted but rejected in ***Ginzburg v. U.S.***, supra. See, in this regard, the eight (8) images obtained from current **free access** web sites located by using the Internet Search Engine "Yahoo" (available to any 12-year old) using the locator request **"Adult Bookstore"**, which are reproduced hereinafter as an attachment to this letter. In the judgment of amicus curiae James J. Clancy, such images are in violation of the "variable obscenity" standards of both the **Communications Decency Act of 1996** and ***Ginzburg v U.S.***, supra.

A motion to file a tardy brief amicus curiae under U.S. Supreme Court Rule 37(3)(e) with brief attached and the reasons for granting the same will be filed some time during the week of February 9-13, approximately a week in advance of the date upon which Appellee A.C.L.U.'s

reply brief will be due (February 20, 1997). The amicus curiae brief (in support of neither party) will be limited to the above argument, which is framed in this letter, i.e., the suggestion that the judgment below should be reversed upon the principle of law ("variable obscenity" standard) applied in ***Ginzburg v. U.S.***, supra., which is not discussed in the Brief for the Appellants or the Amicus Curiae Brief of the National Law Center for Children and Families (which were due on or about January 20, 1997. (My emphasis.)

Thank you for your consideration in this regard.

Sincerely yours,

James J. Clancy
for Amicus Curiae.

JJC/cjc

Sep. letters to: Bruce J. Ennis, Esq., Jenner & Block
Hon. Walter Dellinger, Acting Solicitor General.

cc: Mr. Bruce Taylor, Esq., Counsel for Amici Curiae, National Law Center for Children and Families.

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Alexis

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- Amateur Kim - This blonde will knock your socks off
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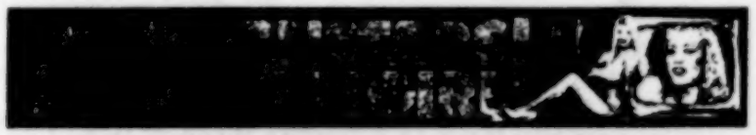

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APPENDIX 2

COPY OF APPELLEE A.C.L.U. AND APPELLEE A.L.A. FAX LETTERS, DATED FEBRUARY 13, 1997 IN WHICH APPELLEES A.C.L.U. AND A.L.A. REFUSE TO GRANT THEIR CONSENT TO THE FILING OF A BRIEF AMICUS CURIAE BY JAMES J. CLANCY (MEMBER OF THE SUPREME COURT BAR) IN ***RENO V. A.C.L.U., ET AL.***, U.S. SUPREME COURT NO. 96-511.

Reference: (1) Motion For Leave To File An Out Of Time Amicus Curiae Brief In ***Reno v. A.C.L.U., Et Al.***, U.S. Supreme Court No. 96-511, Under Rule 37(3)(b) With Attached Brief Amicus Curiae Of James J. Clancy (Member Of The Supreme Court Bar) At **Page 5**.

Reference: (2) Brief Amicus Curiae Of James J. Clancy In ***Reno v. A.C.L.U., Et Al.***, U.S. Supreme Court No. 96-511 At **Page 2**

SENT BY: 2-13-97; 11:58; 2127304652-> ;# 2/ 2
A.C.L.U.F. LEGAL DEPARTMENT
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
National Headquarters
132 West 43rd Street
New York, N.Y. 10036
Chris Hansen
Senior Staff Counsel
(212) 944-9800 Ext. 540
Fax (212) 730-4652
E-mail chrisaclu@aol.com

February 13,1997

James J, Clancy
9055 La Tuna Canyon Road
La Tuna Canyon, California 91352

Re: Reno v. ACLU, No. 96-511

Dear Mr. Clancy:

I received your fax to Bruce Ennis concerning an amicus brief in this case. You should first be aware that Mr. Ennis does not represent appellees ACLU et al. He represents other appellees. On behalf of the appellees ACLU et al., we do not consent to the filing of your brief.

We consented to every amicus who sought to file a brief in a timely manner. Your brief is untimely. Given the schedule necessary to print our brief, we would be unable to respond to your arguments and thus prejudiced by its filing. Moreover, you describe your brief as one in support of neither party; it is not. By urging simple reversal, you are supporting appellants. If you file the motion, we will oppose it.

Thank you.

Sincerely,
Christopher A. Hansen
Counsel of record for the ACLU appellees

cc: Bruce J. Ennis
Hon. Walter Dellinger

SENT BY: JENNER & BLOCK 2-13-97;10:11;2026396066->;# 2

LAW OFFICES JENNER & BLOCK
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
601 THIRTEENTH STREET, N.W.,SUITE 1200
WASHINGTON, D.C. 20005
(202) 639-6000 (202) 639-6066 FAX
Bruce J, Ennis DIRECT DIAL NUMBER: 202-639-6025

February 13, 1997

VIA TELEFAX (818) 352-6549
James J. Clancy, Esquire
Law Office of James J. Clancy
9055 La Tuna Canyon Road
La Tuna Canyon, California 91352
Re: Reno, et al. v. ACLU, et al., No. 96-511

Dear, Mr. Clancy;
I have just received your request for consent to file an out-of-time amicus brief, on your on behalf, supporting reversal of the judgment above.

I do not consent to the filing of the proposed brief, and would oppose any motion for leave to file.

Although appellees consented to every timely request to file an amicus brief supporting the government, your request is untimely and would deny appellees of a meaningful opportunity to respond to the points you would propose to cover in your amicus brief.

Sincerely,
Bruce J. Ennis
Counsel for ALA Appellees
cc: Hon. Walter Dellinger (by fax)
Christopher Hansen (by fax)
Jerry Berman, CDT

APPENDIX 3

COPY OF LIST OF 56 CASES IN WHICH AMICUS CURIAE JAMES CLANCY HAS FILED AMICUS CURIAE AND APPELLATE BRIEFS IN THIS COURT IN OBSCENITY LITIGATION DURING 1963-1990.

Reference: Brief Amicus Curiae Of James J. Clancy In ***Reno v. A.C.L.U., Et Al.***, U.S. Supreme Court No. 96-511 At **Page 2**

1. ***Smith v. California***, 375 U.S. 259, 11 L.Ed.2d 311 (1963).

2. ***Arnebergh v. Zeitlin*** , 375 U.S. 957, 11 L.Ed.2d 315 (1963).

3. ***Jacobellis v. Ohio***, 378 U.S. 184, 12 L.Ed.2d 793, 1333 (1964).

4. ***Memoirs v. Massachusetts***, 383 U.S. 413, 16 L.Ed.2d l, 1052 (1966).

5. ***Ginzburg v. United States***, (two briefs): 383 U.S. 463, 16 L.Ed.2d 31, 1079 (1966)

6. ***Mishkin v. New York***, 383 U.S. 502, 16 L.Ed.2d 56, 1082 (1966).

7. ***Redrup v. New York***, (two briefs): 386 U.S. 767, 18 L.Ed.2d 515, 1520 (1967).

8. ***Austin v. Kentucky***, (two briefs): 386 U.S. 767, 18 L.Ed.2d 515, 1520 (1967).

9. ***Aday v. United States***, 388 U.S. 447, 18 L.Ed.2d 1309 (1967).

10. ***Ginsberg v. New York***, (two briefs): 390 U.S. 629, 20 L.Ed.2d 195, 1486 (1968).

11. ***Cain v. Kentucky***, 397 U.S. 434, 35 L.Ed.2d 334 (1970)

12. ***Cohen v. California***, 403 U.S. 15, 29 L.Ed.2d 284, 1010 (1971).

13. ***Rabe v. Washington***, 405 U.S. 313, 31 L.Ed.2d 258 (1972).

14. ***Papish v. Board of Curators***, 411 U.S. 960, 36 L.Ed.2d 419 (1973).

15. ***Paris Adult Theatre I v. Slaton***, 413 U.S. 49, 37 L.Ed.2d 446 (1973).

16. ***Heller v. New York***, 413 U.S. 483, 37 L.Ed.2d 745 (1973).

17. ***Roaden v. Kentucky***, 413 U.S. 496, 37 L.Ed.2d 757 (1973).

18. ***Grove Press v. Flask***, 413 U.S. 902, 37 L.Ed.2d 1013 (1973).

19. ***Film Entitled "Vixen" v. Ohio, ex rel. Keating***, 413 U.S. 905, 37 L.Ed.2d 1016 (1973).

20. ***Michigan v. Bloss***, 413 U.S. 909, 37 L.Ed.2d 1021 (1973).

21. ***Huffman v. U.S. District Court***, 413 U.S. 918, 37 L.Ed.2d 1039 (1973).

22. ***Boyd v. Ohio***, 418 U.S. 945, 41 L.Ed.2d 1175 (1973).

23. ***Jenkins v. Georgia***, 418 U.S. 153, 41 L.Ed.2d 642 (1974).

24. ***Smith v. Keaton***, 419 U.S. 1043, 42 L.Ed.2d 636 (1974).

25. ***Huffman v. Pursue, Ltd.***, (two briefs): 420 U.S. 592, 43 L.Ed.2d 482 (1975) (James J. Clancy presented oral argument).

26. ***Fair v. Smith***, 421 U.S. 902, 43 L.Ed.2d 769 (1975).

27. ***Art Theatre Guild v. Ewing***, 421 U.S. 923, 44 L.Ed.2d 82 (1975).

28. ***People, ex rel. Camil v. Superior Court***, 424 U.S. 943, 47 L.Ed.2d 348 (1976).

29. ***Alabama, ex rel. Sweeton v. General Corp.***, 425 U.S. 904, 47 L.Ed.2d 753 (1976).

30. ***Smith v. United States***, 426 U.S. 946, 49 L.Ed.2d 1183 (1976).

31. ***People, ex rel. Camil v. Superior Court***, 429 U.S. 1097, 51 L.Ed.2d 544 (1977).

32. ***Marks v. United States***, 430 U.S. 188, 51 L.Ed.2d 260 (1977).

33. ***Harmer v. "Devil in Miss Jones"***, 430 U.S. 967, 52 L.Ed.2d 359 (1977).

34. ***Splawn v. California***, 431 U.S. 595, 52 L.Ed.2d 606 (1977).

35. ***Harmer v. "Deep Throat"***, 432 U.S. 907, 53 L.Ed.2d 1079 (1977).

36. ***Ballew v. Georgia***, 435 U.S. 223, 55 L.Ed.2d 839 (1978).

37. ***City of East Detroit v. Llewellyn***, 438 U.S. 909, 57 L.Ed.2d 1152 (1978).

38. ***Lo-Ji Sales v. New York***, 442 U.S. 319, 60 L.Ed.2d 920 (1979).

39. ***Vance v. Universal Amusement Co.***, (two briefs): 445 U.S. 308, 63 L.Ed.2d 413 (1980).

40. ***City of Newport v. Fact Concerts***, 453 U.S. 247, 69 L.Ed.2d 616 (1981).

41. ***Cooper v. Mitchell Brothers' Santa Ana Theatre***, (three briefs): 454 U.S. 90, 70 L.Ed.2d 262 (1981).

42. ***Brockett v. Spokane Arcades***, 454 U.S. 1022, 70 L.Ed.2d 468 (1981).

43. ***U.S. Marketing, Inc. v. Idaho***, (three briefs): review granted, 434 U.S. 1140, 71 L.Ed.2d 291 (Jan. 11, 1982); appeal dismissed by ***U.S. Marketing***, 455 U.S. 1009, 71 L.Ed.2d 878 (March 10, 1982).

44. ***James J. Clancy, et al. v. Jartech, Inc.***, (three briefs): 459 U.S. 826, 74 L.Ed.2d 62 (1982).

45. Petition for Writ of Certiorari in ***Billmeyer v. Tovar***, No. 83-2041 (1984). Petition denied as untimely. Blackmun and Stevens would deny the petition. 469 U.S. 872, 83 L.Ed.2d 152, 105 S.Ct. 223 (Oct. 1, 1984).

46. Amicus Curiae Brief of City Attorney of Renton, Washington, in ***Brockett v. Spokane Arcades, Inc., et al.***, No. 84-28 (1984), and ***Eikenberry v. J-R Dist., Inc.***, No. 84-143, reversed and remanded in 470 U.S. 491, 86 L.Ed.2d 394 (June 19, 1985).

47. Petition for Writ of Certiorari in ***People ex rel. Ed Cooper, City Attorney of Santa Ana, Calif. v. Mitchell Brothers' Santa Ana Theater***, No. 85-439, denied in 474 U.S. 948, 88 L.Ed.2d 293, rehearing denied, 474 U.S. 1077, 88 L.Ed.2d 811 (Nov. 4, 1985).

48. ***City of Corona, a Municipal Corp., et al. v. Superior Court of the State of California for the County of Riverside***, 475 U.S. 1121, 90 L.Ed.2d 184, 106 S.Ct. 1638 (April. 21, 1986) (No. 85-1402) petition for certiorari filed 2/18/86, denied 4/21/86).

49. ***City of Corona v. Superior Court***, No. 86-17, petition for certiorari filed July 2,1986. Defense Attorney Diamond was requested to make response August 2,1986. Diamond declined opposition to writ on August 27, 1986. Petition denied in 479 U.S. 848, 93 L.Ed.2d 108 (October 6, 1986).

50. Petition for Writ of Certiorari in ***Citizens for Decency through Law, Inc. v. Oak Industries, Inc.***, No. 86-394, denied in ___ U.S. ___, ___ L.Ed.2d ___; ___ S.Ct. ___ (19__).

51. ***City of Paducah, et al. v. Investment Entertainment, Inc., et al.***, 479 U.S. 915, 93 L.Ed.2d 290 (1986).

52. Amicus Curiae Brief of City of Santa Ana in Support of Respondent in ***Pope, et al. v. Illinois***, 481 U.S. 497, 95 L.Ed.2d 439 (May 4, 1987).

53. ***Richard Arcara, Dist. Attorney of Erie County v. Cloud Books, Inc.***, 478 U.S. 697, 92 L.Ed.2d 568 (1986)

54. ***Herceg v. Hustler Magazine***, No. 87-113, Petition for Certiorari filed July 19, 1987. Motion to file amicus brief granted October 5, 1987. Certiorari denied March 21, 1988, 485 U.S. 959, 99 L.Ed.2d 420 (March 21, 1988).

55. Amicus Curiae Brief of James J. Clancy as Attorney for Applegate and Linda Marciano in ***Fort Wayne Books, Inc. v. Indiana***, No. 87-470, filed July 7, 1988; motion granted in ___ U.S. ___, 102 L.Ed.2d 21 (October 3, 1988), 489 U.S. ___, 103 L.Ed.2d 34 (February 21, 1989).

56. ***Karen Applegate, et al. v. Superior Court*** and ***People v. Freeman***, No. 88-1050, Petition for Certiorari denied, ___ U.S. ___, 103 L.Ed.2d 194 (February 21, 1989).

APPENDIX 4

COPY OF BRIEF AMICUS CURIAE OF CITIZENS FOR DECENT LITERATURE, INC., IN ***RALPH GINZBURG, ET AL. V. U.S.***, FILED IN SUPPORT OF RESPONDENT UNITED STATES OF AMERICA, U.S. SUPREME COURT, OCTOBER TERM, 1965, NO. 42.

Reference: Brief Amicus Curiae Of James J. Clancy In ***Reno v. A.C.L.U., Et Al.***, U.S. Supreme Court No. 96-511 At **Page 4**

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 42

RALPH GINZBURG, DOCUMENTARY BOOKS, INC.,
EROS MAGAZINE, INC., LIAISON NEWS LETTER, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Writ of Certiorari to
the United States Court of Appeals for the Third Circuit**

Brief Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Respondent

CHARLES H. KEATING, JR.
3300 Carew Tower
Cincinnati, Ohio 45202

JAMES J. CLANCY
9055 La Tuna Canyon Road
Sun Valley, California

Counsel for Amicus Curiae

SUBJECT INDEX

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N THE

Supreme Court of the United States

October Term, 1965
No. 42

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS MAGAZINE, INC., LIAISON NEWS LETTER, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Brief Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Respondent.

Interest of Amicus Curiae.

Citizens for Decent Literature, Inc., an Ohio Corporation, with local affiliates throughout the United States is a non-profit, non-sectarian and non-political corporation with national headquarters in Cincinnati, Ohio, formed for and dedicated to the cause of good, decent and wholesome literature with a view to oppose and eliminate obscene literature, by cooperating with law enforcement in the enforcement of the laws. For the

Court's convenience *amicus curiae* is hereinafter referred to by the single short title, CDL.

CDL believes that there exists a growing flood of publications, purposely designed and manufactured with a sensationalized appeal to prurient interest, that threatens to overthrow the basic morality upon which our nation and our Constitution were founded; that while the First Amendment of our Constitution has, from the time of our nation's founding, been construed to afford no protection to such publications, a loud voice is now being heard in the court-room advocating the overruling of this "balancing of interest" interpretation in favor of an absolutist approach, aimed at nullifying the nation's basic obscenity laws.

At its national convention in Chicago during October of 1963, the national organization of Citizens for Decent Literature adopted a policy aimed at giving increased support in the fight against "obscenity," through legal advocacy in the courtroom in support of the people's case.

Ralph Ginzburg, et al. v. United States of America is a case of nationwide importance which will have a serious effect on enforcement of the obscenity statutes throughout the nation.

Statement of the Case.

On August 13, 1962, Eros Magazine, Inc. of 110 West 40th Street, New York, requested an application to mail without affixed postage from the post office at Middlesex, New Jersey, through General Mailing Corporation, a mail-order house patron of the Middlesex post office. Permit No. 8 was issued on August 14, 1962.

In letters dated September 4, 1962 and October 18, 1962, Eros Magazine, Inc. wrote the postmasters of Blue Ball, Pa., and Intercourse, Pa. as follows:

> "After a great deal of deliberation we have decided that it might be advantageous for our direct mail to bear the postmark of your city."

The letters were on Eros Magazine, Inc. stationery and were signed by Frank R. Brady, Associate Publisher of Mr. Ginzburg. The postmaster of Intercourse, Pa., by letter dated September 8, 1962, replied that his post office was too small to handle bulk mailings.

Eros Magazine, Inc. of 110 West 40th St., New York, commenced mailings from Middlesex post office on October 7, 1962. Approximately 5,053,884 pieces of bulk mail advertisements for Eros Magazine had been mailed up to the date of trial, June 10, 1962, at a total cost of $132,704.93.

On November 20, 1962, Documentary Books, Inc., requested an application to mail without affixed postage from the post office at Middlesex, New Jersey, through General Mailing Corporation, a mail-order house patron of the Middlesex post office. Permit No. 8 was issued on November 20, 1962. Thereafter 5,543 copies of "The Housewife's Handbook on Selective Promiscuity" were shipped from that post office.

First-class mailings of Liaison News Letter, Inc. were also mailed from the Middlesex post office.

An investigation was commenced within days after the first mailings of Eros at Middlesex, New Jersey.

Thereafter testimony was presented to a Federal Grand Jury sitting in the Eastern District of Pennsylvania, which on March 15, 1963, returned its true bill

of indictment charging petitioners in 28 counts with mailing obscene publications and advertisements for such publications, in violation of 18 U.S.C. 1461 [R. 1a, 6a-13a].

Petitioner Ralph Ginzburg was named in all 28 counts. One of the three corporate petitioners was also named with Ginzburg as a co-defendant in each of the 28 counts.

Petitioners Ralph Ginzburg and Documentary Books, Inc. were charged with three counts (Counts 1 through 3) of having caused the mailing of advertisements to two persons in Philadelphia and one person in Havertown, Pa., on November 15, November 17 and December 12, 1962, telling where an obscene book, "The Housewife's Handbook on Selective Promiscuity" by Rey Anthony could be obtained. The same petitioners were also charged with six counts (Counts 11 through 16) of having caused the mailing of the same obscene book to six persons in Philadelphia, Pa.

The petitioners Ralph Ginzburg and Liaison News Letter, Ind. were charged with three counts (Counts 4 through 6) of having caused the mailing of advertisements on November 27, 1963 to three persons in New Hope, Pa., Havertown, Pa., and Paoli, Pa., telling where an obscene pamphlet, named "Liaison, Vol. 1, No. 1" could be obtained. The same petitioners were also charged with four counts (Counts 23 through 28) of having caused the mailing of the same obscene pamphlet, "Liaison, Vol. I, No. 1" to four persons in Philadelphia, Pa., one person in Jenkintown, Pa., and one person in Valley Forge, Pa.

Petitioners Ralph Ginzburg and Eros Magazine, Inc. were charged with four counts (Counts 7 through 10)

of having caused the mailing of advertisements on March 24, November 17, December 11, and December 18, 1962, to persons in Philadelphia, Pa., Rosemont, Pa., Chester, Pa., and Elkins Park, Pa., telling where an obscene book, named Eros, Vol. 1, No. 4, could be obtained. The same petitioners were also charged with six counts (Counts 17 through 22) of having caused the mailing of the same obscene book, Eros Vol. 1, No. 4, to five persons in Philadelphia, Pa., and one person in Gladwyne, Pa.

On April 11, 1963, petitioners filed a motion to dismiss the 18 counts of the 28-count indictment which pertained to "The Housewife's Handbook on Selective Promiscuity" and Liaison Vol. 1, No. 1 on the ground that such materials were not obscene within the meaning of 18 U.S.C. Section 1461 [R. 13a]. Copies of the book and pamphlet and advertisements referred to in the 18 counts were attached to the motion as exhibits. Annexed to the motion was an affidavit of petitioner Ralph Ginzburg [R. 14a-16a] saying that "prior hereto and in February 1962" he had written 1000 "prominent persons" asking their view on "The Housewife's Handbook" and annexing 69 replies thereto, together with a book review of the "Handbook" by William J. Bryan, Jr. M.D. appearing in the Journal of the American Institute of Hypnosis, January 1962 and a book review of the "Handbook" by Dr. Robert M. Frumkin, appearing in the Journal of Human Relations, Summer 1962, Vol. IX, page 513.

On May 8, 1963, petitioners acknowledged by stipulation that in all counts in which the three publications or the advertisements pertaining thereto were involved, they "did knowingly mail or cause to be mailed the materials set forth in those counts on the dates set forth,

fully knowing the contents of said materials." [R. 149a, 150a, 152a].

On May 17, 1963, the people's motion to strike the Ginzburg affidavit and its 69 annexed exhibits was granted. On May 23, 1963 petitioners' motion to dismiss the 18 counts of the 28-count indictment was denied [R. 151a].

On June 10, 1963, petitioners filed a waiver of trial by jury [R. 2a]. The case was tried to the court on June 10, 11, 12, 13 and 14, 1963, and the trial judge rendered his verdict on June 14, 1963.

During its case in chief, the United States of America called the postmasters of Middlesex, New Jersey, Blue Ball, Pa., and Intercourse, Pa., the postal inspector of Middlesex, New Jersey, and the editor of Liaison Vol. 1, No. 1. After introducing in evidence a copy of "The Housewife's Handbook on Selective Promiscuity," "Eros Vol. 1, No. 4" and "Liaison Vol. 1, No. 1," and the ten advertisements and their mailing envelopes, supporting Counts 1 through 10, the people rested.

In their defense, petitioners called seven witnesses: A clinical psychologist, an art critic, the author of "The Housewife's Handbook on Selective Promiscuity," a magazine editor, an attorney, a psychiatrist, and a Southern Baptist minister/family counselor. Eight books and pamphlets were introduced into evidence as examples of "hard-core pornography" and 34 magazines and paperback books were introduced into evidence as having been recently purchased in shops in New York City and Philadelphia, Pa.

In rebuttal the United States Government called three witnesses: two psychiatrists (one male and one female), and a Baptist minister/family counselor.

United States of America: Case in Chief.

Arthur J. Rodgers, Jr., the Postmaster of Blue Ball, Pa. testified as follows: In the course of his business as postmaster he had received a letter on the stationery of Eros Magazine, Inc. dated October 18, 1962, and signed by Frank R. Brady, Associate Publisher of Mr. Ginzburg, reading in part, "After a great deal of deliberation, we have decided that it might be advantageous for our direct mail to bear the postmark of your city. . . ." [R. 152a-155a, Ex. G-1]. The postmaster's reply was not offered in evidence, nor was there evidence presented of any mailings from the Blue Ball post office.

Miss Bertha M. Martin, the postmaster of Intercourse, Pa., testified as follows: In the course of her business as postmaster, she had received a similar letter on the stationery of Eros Magazine, Inc., dated September 4, 1962, and signed by Frank R. Brady, reading in part: "After a great deal of deliberation, we have decided that it might be advantageous for our direct mail to bear the postmark of your city. . . ." She informed the originator by letter that, because of limited facilities, the Intercourse post office would not be able to handle bulk mailings in such a volume [R. 156a-159a].

Robert W. Sanders, the postmaster of Middlesex, New Jersey, testified as follows: On August 13, 1962, petitioner Eros Magazine, Inc. of 110 West 40th Street, New York, requested an application to mail without affixed postage, through General Mailing Corporation, a mail-order house patron of Middlesex post office. Permit No. 8 was issued on the following day. Substantial bulk mailings commenced on October 7, 1962 and continued to the present time (June 10, 1963). Approximately 5,053,884 pieces of third-class bulk mail contain-

ing advertisements for Eros Magazine went out, at a mailing cost of $132,704.93. The total pieces of all classes of mail was 6,067,573 and the cost of mailing was $163,438.48.

On November 20, 1962, petitioner Documentary Books, Inc. requested an application to mail without affixed postage, through the same mail-order house patron of Middlesex post office and Permit No. 8 was issued by his post office (Middlesex) on the same date. A total of 5,543 copies of "The Housewife's Handbook on Selective Promiscuity" were received for mailing.

Liaison News Letter, Inc. also mailed first-class mailings through his post office (Middlesex).

J. Shane Creamer, the Assistant United States Attorney, placed in evidence the ten advertisements and mailing envelopes which were received through the mail, which were the basis for the first ten counts of the indictment. The exhibits were the subject of a stipulation previously filed with the Court on May 8, 1963, in which the petitioners acknowledged that they did "knowingly mail or cause to be mailed" the same "on the dates set forth, fully knowing the contents of said materials." [R. 165a, 149a, 150a, 152a].

Hugh J. McDermott, a postal inspector of Middlesex post office testified that he began investigating the case as to a violation of the postal obscenity statutes within days after the first mailings of Eros at the Middlesex post office [R. 172a].

John Willis Darr, the editor of "Liaison Vol. 1, No. 1," the pamphlet named in the indictments, testified that he had been a writer for twelve years and as such had been referred to the Eros offices in September or October of 1962, by an employment agency [R. 173a]. After an interview with Warren Boroson, he received a post card from Mr. Ginzburg inviting him to submit samples of his past work which he did. Within a week of the time that he was referred by the employment agency, he was interviewed by Mr. Ginzburg, who told him he was looking for an editor and writer for Liaison. "Liaison" was to cover the same scope as "Eros," but in a more newsworthy fashion [R. 174a]. Following this interview and at Ginzburg's request, he submitted an article called "How to Run a Successful Orgy" to their offices, which later appeared in Liaison News Letter in a revised form [R. 175a]. Later Ginzburg telephoned him and said, "When can you start to work?" [R. 177a]. He was hired at a salary of $7500 a year [R. 181a].

As editor of "Liaison" he inherited a collection of magazines, newspapers, clippings and notes which he used as research material and background for the newsletter [R. 177a]. He identified, as having been written by him, the statement of policy, appearing on page 1, the article, "Semen in the Diet," appearing on pages 4 and 5 and the article, "Sing a Song of Sex Life," appearing on pages 5 and 6 of "Liaison Vol. 1, No. 1" [R. 179a, 181a]. All of the copy for the newsletter was placed in a basket on the desk of the front office and from there it was transported up to Ginzburg's office upstairs. As a rule he would get the material back on his desk the next day.

Ginzburg gave him instructions that the last page should not contain any four-letter words. The newsletter was folded for mailing in such a manner that two-thirds of the last page was exposed to those handling

the mails [R. 179a]. As to the statement of policy, Ginzburg might have said, "It is all right" or "It is good" or something like that [R. 179a]. He had a discussion with Ginzburg about his reaction to the article, "Sing a Song of Sex Life." They discussed the line "The professors have crawled out of the dust and discovered lust" and he thought Ginzburg liked that line [R. 181a].

At the time of his termination of employment in November of 1962, he had completed five issues of "Liaison" and two had been published [R. 183a].

The Assistant United States Attorney placed in evidence a copy of "Liaison Vol. 1, No. 1" [Ex. G-16, R. 178a]. "The Housewife's Handbook on Selective Promiscuity" by Rey Anthony [Ex. G-17, R. 184a] and "Eros, Winter, 1962, Vol. 1, No. 4" [Ex. G-18, R. 185a] and rested the Government's case in chief.

Petitioners' motion for dismissal of the indictment on the ground that the Government had failed to make out a case under 18 U.S.C. Section 1461 was denied.

Ralph Ginzburg et al.'s Defense.

Dr. Charles G. McCormick, a clinical psychologist, testified that pornographic material could be described in psychological terms and gave his opinion as to what he, as a psychologist, considered to be pornography [R. 188a]. In his opinion pornographic material must "combine both the sense of pleasure and the sense of guilt or shame" in the individual [R. 188a] and that the sense of guilt or shame was a "sense of being able to engage in something that is intrinsically bad to the reader based upon whatever he had accumulated from

the air in which he grew up. . . ." [R. 189a]. He thought that most pornographic materials "are published secretly . . . without acknowledgement . . . won't even carry a title page on which the author's name is given or the publisher's name is given. There is no date . . . no commitment for responsibility behind it." And that these surreptitious factors gave the person who would read them the impression that sexual expression was evil, sex was shameful and that what the material was about was a shameful item [R. 191a]. In his opinion one of the essential building blocks of pornographic material was the distortion of reality, such as the reaction of the pre-adolescent girl to her violation in "the autobiography of the flea." Such distortion was necessary "to bring his readers' attention exclusively on attempting to absorb the guilty pleasure from the material itself." ". . . there would have to be something wrong with the person for" the pornographic material he referred to not to act as a sexual stimulant and produce sexual stimuli. ". . . he would have to be ill in some way, physically or psychologically." [R. 193a].

In his opinion, while under certain circumstances, the view of an attractive nude woman could erotically stimulate an average male and such erotic response would be felt and experienced by the individual exactly the same as for pornographic material [R. 194a], the stimuli of shame which accompanied pornography would not be produced in the viewer nor would he have an itching or a morbid or a licentious sexual arousal unless the person were pathological [R. 195a] or "the publication were designed to do this, but under ordinary circumstances where the publication were a responsible one, there would be no reason to expect this to be so."

In his opinion, a person would have to be extremely exhibitionistic (pathological) not to feel uncomfortable about having his neighbor see him reading the material which he considered as pornographic.

". . . in presenting the examples of the type of material which Dr. McCormick has testified to . . ." [R. 201a] Sidney Dickstein, the defense counsel, placed in evidence eight books and pamphlets: "A Small Pig" booklet [Ex. D-1], a pamphlet, "John Dillinger in a Hasty Exit" [Ex. D-2], a pamphlet, "Mr. Bregar is Sold on TV" [Ex. D-3], a booklet, "Dagwood Has a Family Party Let's Go" [Ex. D-4], a pamphlet, "Secrets Will Out" [Ex. D-5], a book, "The Oxford Professor" [Ex. D-6], a book, "The Autobiography of a Flea" [Ex. D-7], and a book, "Devil's Advocate" [Ex. D-8]. Dr. McCormick testified that the effect of such materials on the average person would "be one of revulsion, and one of being assaulted." "In other words, it is actually destructive for the individual, the ordinary individual to read that kind of material because he doesn't have the emotional base and he doesn't have the capacity for keeping context. . . ."

Dr. McCormick testified that he had read "Lady Chatterley's Lover." It was his opinion that while Exhibits D-1 through D-8 and "Lady Chatterley's Lover" were all sexually stimulating, the impact on the system of the ordinary individual was radically different. He said "There is context. The reality setting, the reality factors, the complications, the responsibilities of the author, the attitude of the author as he presents the material. . . ." [R. 203a]. In "Lady Chatterley's Lover" there "is a responsibility in the sense that the actual presentation by the author gives you reality situations rather well. . . ." [R. 204a].

Dr. McCormick testified that he was acquainted with "Lolita" by Nabakov. It was his opinion that the subject matter and themes of "Oxford Professor" (one incident of which involved the seduction of an immature girl) and "Autobiography of the Flea" and "Lolita" (the story of the seduction of a pre-adolescent by an established psychotic individual) were identical, but the books were "different" in the way in which they dealt with the similar subject matter. The difference was reality. "Lolita" was psychologically sound. The author makes the reader appreciate the fact that "this is one individual's distortion, but a reality of distortion" [R. 205a].

Dr. McCormick testified that he had read "The Housewife's Handbook on Selective Promiscuity" and that in his opinion the predominant effect of this material was not to create in an average person an itching, morbid or shameful desire or longing with respect to sex [R. 206a]. In his opinion the book was not morbid, nor did it tend to corrode and turn the reader against himself in the process of reading [R. 210a], as was the case with pornographic material. It gave a realistic picture of a woman's attitude and activities with respect to sex [R. 210a]. It would not produce a guilty feeling in the individual because it was supported by a responsible attitude on the part of the author. A reader will feel informed rather than guilty after having read it [R. 211a].

Dr. McCormick had read "Eros Vol. 1, No. 4" and was of the opinion that the predominant effect would not create in the average person an itching or morbid or shameful desire or longing with respect to sex. He thought that there were a couple of passages in Eros

that would be erotically stimulating to an average person reading it, such as in the article by Frank Harris [R. 212a] and the article by the Kronhausens [R. 213a] and that they would not stimulate in the average person a morbid or unhealthy attitude toward sex, because of the reality context that the author, wto is quoted, maintains. "While erotically stimulating, it is not pathological" [R. 214a].

Dr. McCormick had read "Liaison Vol. 1, No. 1" and was of the opinion that the predominant effect of it would not create in the average person an itching, morbid or shameful desire or longing with respect to sex, nor would it be erotically stimulating [R. 215a]. He was of the opinion that one who was already perverted (a paraphiliac) would be sexually stimulated because of psychic distortions [R. 215a]. While both the article by Dr. Albert Ellis and the article "Semen in the Diet" had the tone of an assault on the reader, neither one would have any erotic effect because they lacked any established association with the reader [R. 216a].

Dr. McCormick was of the opinion "The Housewife's Handbook" would be quite useful as an educational instrument [R. 216a]. It gave a realistic portrayal of the evolution of sexual awareness and sexual expression of "an ordinary everyday person with the natural emotional and intellectual limitations who had to grope . . . through just like everyone else has to grope his way through toward some kind of sexual adjustment. . . ." He considered it a valuable instrument for a person who was looking for sexual education. He thought the book would be useful under supervision. The restriction was imposed for the purpose of guiding the person in making distinctions "where the layman in reading it

would not be able to distinguish those aspects hat were the individual's own problems and those aspects of the material that were a natural universal problem of getting educated." [R. 217a].

The Assistant United States Attorney did not cross-examine Dr. McCormick.

Horst W. Janson, an art critic, testified as to the origin of the etchings, engravings and woodcuts appearing in "Eros Vol. 1, No. 4" at pages 2, 6, 7, 8, 9, 10, 11, 12, 13 and 81 [R. 219a-220a]. He thought the photographs on page *73 et seq.* in the essay entitled "Black and White in Color" were "outstanding, beautifully and artistic photographs." The photographer had an "extraordinary sense of form and composition" [R. 221a]. He saw the "symbolic expression of blending together of the equivalence of the two people represented," so familiar in certain British postage stamps, used as an artistic compositional device, in the first photograph depicting the Caucasian female's facial profile superimposed on the Negro male's profile, in the full page photograph of the two eyes, and in the final full page photograph depicting the full length nude Negro male and nude Caucasian female in an amorous embrace. He was of the opinion that in terms of material and graphic layout and taste displayed in presenting the material, Eros was the equal of any magazine being published today [R. 222a].

The Assistant United States Attorney did not cross-examine Mr. Janson.

Lillian Maxine Serett, the author of "The Housewife's Handbook on Selective Promiscuity," testified that she started writing the book 15 years ago and finished it three years ago. She had gone into the printing

business two years prior to finishing the book and had printed it herself under the title "The Housewife's Handbook for Promiscuity" and the printing label, Seymour Press [R. 223a]. The edition published by Documentary Books, Inc. had the same textual matter as her edition [R. 224a] which she originally published in August and September of 1960. A reprint with an introduction by Dr. Ellis was mailed out to doctors, psychologists, and college professors who were heads of psychology departments. Approximately 400,000 brochures were mailed since October, 1960 and a little over 12,000 copies had been sold [R. 225a].

She stated that the Kinsey Reports confirmed her belief that woman's role in sex was widely misunderstood and that she hoped her book, written in a layman's language, could communicate to women that the sexual activities and attitudes they have are not unusual or unique, that various forms of sexual expression are normal and healthy things to do and that women do have sexual rights [R. 226a].

The Assistant United States Attorney did not cross-examine Mrs. Serett.

Dwight MacDonald, a magazine editor and literary film critic, testified that he reads about 200 books a year or about five a week. He had seen a change or movement in the permissible limits of sexual candor in our literature, especially in the last five or six years [R. 230a]. That "Fanny Hill," which had always been regarded as "hardcore pornography" should be published was extremely significant in his judgment, as was the publication of "Tropic of Cancer" and "Naked Lunch," "which is an extremely, really a sick book" [R. 231a].

He recalled that six or seven years ago the models in girlie magazines had to wear brassieres, whereas now they can expose their bosoms, although "they can't be actually nude from the front anyway, but that will perhaps come." In the movie industry of the 20's, one could not show two people living together who were not married, nor could they show a husband and wife in a single bed [R. 234a]. Now it was possible to show rape, prostitution, and explicit scenes of sexual intercourse [R. 235a].

Dwight MacDonald testified that he had read "The Housewife's Handbook on Selective Promiscuity" and that in his opinion, "Speaking as a long-time student of mass culture in American society" he would say that it did not go substantially beyond the customary limits of candor that American society permits in its literature at this time." He thought that it was not a particularly interesting book, that it had no literary value, and that its only importance would be as case history for doctors. In comparing it with "Lady Chatterley's Lover," he thought the latter a work of literary art, whereas "The Housewife's Handbook" was not [R. 236a].

He was of the opinion that "Liaison Vol. 1. No. 1" was "an extremely tasteless, vulgar and repulsive issue" but that it did not go substantially beyond the customary limits of candor we tolerate in discussion of sexual matters and that he did not think it obscene or pornographic [R. 237a].

He was of the opinion that "Eros Vol. 1. No. 4" did not go substantially beyond the customary limits of candor which we in this country now tolerate and accept [R. 238a]. He was of the opinion that the following articles had significance or note for some literary merit: "Love in the Bible," "Jewel Box Review," "Let-

ters from Allen Ginsberg," "Was Shakespeare a Homo?" "New Twists on Three Great Trysts," "The Natural Superiority of Women as Erotisists," "Black and White in Color," and "Lysystrata." [R. 239a]. He thought there were a considerable number of articles that had either trivial or poor literary merit and at least one, "Bawdy Limericks," had no merit and was quite vulgar. Nevertheless, he did not think them obscene or pornographic [R. 240a].

The Assistant United States Attorney did not cross-examine Mr. MacDonald.

Sidney Dickstein, the defense counsel, placed in evidence a copy of "Memoirs of a Woman of Pleasure" by John Cleland [Ex. G-9] as having been discussed by Dwight MacDonald.

Arthur J. Galligan, the law partner of the defense counsel, testified that he had visited several stores in New York City in the vicinity of 6th and 42nd Street and in Philadelphia, Pa., in the vicinity of 15th and Market and had made numerous purchases of paperback books, girlie and nudist magazines. The following of his purchases were placed in evidence as Exhibits D-10 through D-43* [R. 243a-256a]:

D-10 Waterfront Blonde
D-11 Rogue Magazine
D-12 Gang Girl

*Gang Girl and Wild Body held obscene in *Chi. v. Wood*, 63 M.C. 156720; Nymph #4 held obscene in *Chi. v. Charles Kimmel*, 63 M.C. 190116; Pastime, Vol. 2, No. 4, held obscene in *Chi. v. Westbery*, 63 M.C. 104281; Adam, Vol. 7, No. 6, held obscene in *Chi. v. Soden*, 63 M.C. 155883; Escapade, April 1964, held obscene in *Chi. v. Dahlia*, 64 M.C. 127005; Snap, Vol. 4, No. 2, and Tip Top, Vol. 3, No. 6, were subjects of federal obscenity indictments in *United States v. Milton Luros et al.* (trial date Oct. 18, 1965); Gymnos, Oct. 1963, held obscene in *Dale Book Co. v. Leary*, 233 F. Supp. 754 (Aug. 12, 1964); see also other paperback books, girlie magazines and nudist magazines which have run afoul of the law as tabulated in CDL Commentaries, Vol. 1, No. 2 (Nov. 1965). This problem of comparables is analyzed in *United States v. West Coast News Co., et al.*, 228 F. Supp. 171, 191.

D-13 The Sucker
D-14 Pushover
D-15 Rock-N-Roll Gal
D-16 They Couldn't Say No
D-17 Wild Body
D 18 Nymph Issue No. 5
D-19 Tic Toc Vol. 1 No. 2
D-20 Pastime Vol. 2 No. 5
D-21 Adam Vol. 7 No. 6
D-22 Satan's Scrapbook Vol. 1 No. 1
D-23 Kiss No. 2
D-24 Stark Vol. 1 No. 1
D-25 French Frills Vol. 2 No. 5
D-26 Hip and Toe Vol. 1 No. 2
D-27 Vue, July Issue
D-28 Photo Button, Series 7
D-29 Treasure Box Review, Series 18
D-30 Treasure Box Review, Series 19
D-31 Tip Top Vol. 2 No. 6
D 32 Snap Vol. 3 No. 2
D-33 Twilight No. 3
D-34 Zoftick Vol. 2 No. 1
D-34 Ruby Vol. 1 No. 1
D-36 Torch Vol. 2 No. 1
D-37 Nude Word Issue No. 6
D-38 Gymnos July 1963
D-39 The Wrong Turn, and Season of Love
D-40 Escapade, August Issue
D-41 Cavalcade, August 1963
D-42 Scamp, September
D-43 M R Spring 1962

Dr. Peter G. Bennett, a psychiatrist, was asked to define pornography in psychiatric terms. He stated his opinion that pornography was more than an intense stimulation of erotic feelings, which in itself was not harmful or disturbing to the ordinary mature adult. Pornography had, in addition to the erotic stimulation, a disturbing disintegrative influence even on the mature person which is almost impossible to resist and which abrades the conscience, causing morbid feelings of shame and guilt [R. 260a]. He stated that the average well-adjusted person's deep-seated guilt and shame about some aspects of sex as a result of his early education or lack of it will disappear as the person allows himself to become better acquainted with the subject, and that the anxiety, caused by sexual realism, may even be turned to a fuller enjoyment of life 'as I think might happen to many as a result of reading "The House-Wife's handbook." In his opinion, the characteristic of the mind which was primarily attacked by pornography was its narcotic appeal to the remnant of infantile narcissism which is present in every-one—the selfish wish for total satisfaction without regard for people or responsibility which is characteristic of the newborn child [R. 262a]. Pornography forcibly stimulates intense narcissistic fantasy by portraying orgiastic sexual and sadistic satisfaction in the most compelling and unreal way. "The narcissistic impulses cause a morbid sense of shame and a desire to regress to infancy to some extent even in the well-adjusted mature adult, whereas erotic realism only causes an erotic stimulation without regression for which the aforementioned individual would feel no shame or guilt." [R. 263a].

Dr. Bennett testified that the reading of "The Housewife's Handbook" by a mature person who is not mentally ill would not have the effect upon his psyche that he attributed to pornographic material [R. 264a].

He testified that he had read "Eros Vol. 1, No. 4" and that a reading of this volume by an average person would not have the same effect as the reading of the pornographic material which he had described. He thought the predominant effect of some of the articles was sexually stimulating and others was not [R. 265a].

He was of the opinion that there was nothing in Liaison Vol. 1, No. 1 that would sexually stimulate an average individual or create morbid or shameful or licentious thoughts [R. 266a].

On cross-examination by the Assistant United States Attorney, he stated that the intent of the person producing the material was not a factor in his psychiatric definition of pornography. It was his opinion that what the American society as a whole understood to be pornographic, *i.e.*, persons who write things that stimulate sexual curiousity violently for purposes of financial gain, was not his psychiatric definition of pornography [R. 268a].

The trial judge asked Dr. Bennett if the acts of sodomy performed by Dr. Adler on the author as described at page 207 would have any shameful effect on the average reader. Dr. Bennett replied that it would not in the mature person [R. 271a]. The court inquired whether those paragraphs "would suggest to a boy or girl near 21 years of age ways (sodomy) of having sexual intercourse in order to have greater satisfaction" and Dr. Bennett answered, Yes, and that it would be permissible in his opinion. The court asked if Dr. Bennett was speaking of mental or sexual maturity and Bennett re-

plied he was talking of emotional maturity. Dr. Bennett said that he thought that the average 14-year old would not be disturbed by reading such material. The Judge asked if they read this, would they try to do this in order to have greater sexual satisfaction. Dr. Bennett said, no, not at that age. The Judge called his attention to the paragraph preceding the act of sodomy (where Dr. Adler tells the author that her husband was sick, when he said that there were more important things than sex etc.) and asked him if that would have any shameful effect on a reader or suggest a moral code that it was all right to have sexual relations with one not your spouse. Dr. Bennett agreed that was the author's opinion but stated it would not create any shameful effects. He was of the opinion that "A reader who is old enough to wade through this book—and by that I mean 12, 13, 14—would recognize that this is the author's opinion but not necessarily the moral code or the code of society."

George Von Hilsheimer, III, a Southern Baptist minister, who was trained in psychology and had done some counseling and therapy with the underprivileged in both urban and rural areas, testified to the attitudes toward sex held by Christian groups and to certain changes that have recently occurred [R. 281a].

He said that he first saw 'The Housewife's Handbook" in 1960 when one of his colleagues gave him a copy. He had used it since in his pastoral counseling and in his psychological counseling with married women who have a sense of shame, as a means of ventilating that sense of shame [R. 289a]. He was of the opinion that it teaches them their own sexual failures are not unusual [R. 290a]. "We have an almost idolotrous con-

cept of marriage in our country. Little girls are told practically from the moment of birth that this is the one road to happiness and almost to salvation. They are told that somehow a mystical magical experience is going to occur with this marriage that was made in heaven, which is a heretical theological notion in itself. They will meet the man of their dreams, he will be perfect for them, they will marry and things will be lovely and beautiful thereafter. They are told this by comic books, by television, by movies, by every possible medium of public culture. They are told a lie. They are told a myth . . . Now it is necessary for the pastoral counselor and for the psychologist if he is going to be responsible to his youth and to his parents to give them a more realistic view of the world in which they live and the problems that they are going to face and to fit them with the practical, detailed, immediate, realistic and unshamefully communicated knowledge about the things which are most important to them. This to me is the great value of this book. It says, 'you are not alone. This is the experience of many, many people,' and it gives a certain amount of hopefulness to it. It is in my mind theologically quite an innocent book. . . ." [R. 291a]. In his opinion the book was a straightforward recount of a fairly unhappy history of a fairly typical woman and was not drawn far from the average middle American experience. Although he thought the standard marriage manuals helpful, the language was too complicated [R. 292a].

On cross-examination by the Assistant United States Attorney he indicated he did not use the book as a blueprint for what one was supposed to do but used it as a means of ventilating a sense of shame [R. 294a]. It's main value was that it discussed in quite simple

terms things which were not ordinarily discussed. He said he would give the book to the person being counseled with a comment, "If you think you have difficulties . . . then look at the book in this way and see what it has to teach you." He did not supervise since he believed that people can read freely and have the ability to solve their own problems without his intimate and daily guidance." [R. 295a].

The trial judge asked if it was the kind of a book that he would like to have in the library of his home if he had a 14, 15 or 16-year old son or daughter. The Reverend replied that it was in his library at home and that his wife and the teenage children in his parish read it [R. 296a]. The Judge asked him if, in his opinion, the things discussed related to matters of sexual perversion [R. 296a]. The Reverend replied that the kinds of relationships the author describes were not commonly held by psychologists as perversions, but whether or not this is true, such was a "part of these children's lives, the material that is freely available to them is the hard-core pornography, shamefully discussing lewd, prurient kinds of garbage. . . ." "This kind of book in the setting of a person they trust and respect who has said. 'Read it, We will discuss it' will form the relationship of a new kind of understanding." "If I am to work effectively with them I must have means to read, of talk, or give them to read that with ease they can talk about things they do know about in a distorted way, and then we can talk about what is the kind of relationship you should have and I should have, and the proper kind of relationship." [R. 297a].

The Court asked: "How about the person who reads the book and doesn't have the reverend to go to talk

to him about it and believes this is a code of morals that should be followed as set forth in this book?" The Reverend answered: "This is one of the difficulties to me of pornography." [R. 297a]. The Reverend did not think any person, particularly a teenager, reading the book was going to be convinced that adultery was a proper way of life [R. 298a]. He thought the book would be read "in the context of what kids and adults are saying to each other." [R. 300a].

Asked by the Judge if he thought that wide circulation of the book would be perfectly all right, he said that he thought it would serve as a ventilation from all the kinds of horrible trash that was freely available, the books on any newsstand which show sodomy, lesbianism, homosexuality and adultery freely practiced [R. 305a]. Asked by the Judge if such wasn't in this, book, he replied: "But dealt with in an unshameful way, a dry way, a straight forward way." [R. 305a], He said that he worked with children "whose common expression is a four-letter expression. This is their form of greeting and this is common and extending in our culture. I work with adults whose common form of recreation is the telling of dirty and sometimes obscene and pornographic stories" and that the book has "a tremendous value in this kind of counseling." [R. 307a].

Asked by the Trial Judge whether he would approve of the methods of sexual relationship set forth in the book (sodomy) the Reverend replied, "No, I would say again that the intimate relationships of a loving couple in marriage, so long as they have developed naturally and with regard for the integrity of one another, that there is no such thing as perversion." The Judge then asked him to read the passages on pages 207 describing

the sodomy act and asked him the question with regard to the relationship that is there (between the female author and the male doctor, unmarried). The Reverend replied, "I repeat, this was not described—so long as it is in the boundaries I have stated—this does not describe a perversion and it describes a kind of sexual relationship which is generally regarded as quite permissible and proper so long as it is within the right framework." [R. 311a.]

The defense rested its case.

United States of America: Rebuttal.

The United States Government called three witnesses, two psychiatrists and one minister. It was stipulated that their testimony was to be considered for rebuttal purposes only [R. 335a].

Dr. Nicholas George Frignito, a psychiatrist, testified that in his opinion "The Handbook" had no medical value, because it gave a distorted viewpoint of the sexual behavior of women and the type of behavior that is prevalent in our community, that it fosters sexual perversity and implies adultery, fornication and sexual perversion are all right [R. 320a].

In his opinion it was a danger to the majority but was not a threat to professional people who had training and knowledge in this sort of business [R. 321a]. This type of material would be dangerous for an adult boy in that it encourages all types of sexual behaviors such as masturbation and increases sexual promiscuity [R. 322a]. It would incite the average 14-year old to sexual misconduct [R. 323a] and lead to "self abuse, masturbation and that would lead to other types of sexual activity" [R. 324a]. As to the average adult person it

would stimulate his prurient interest and certainly would mislead him into believing that such was acceptable behavior in our community. The prurient interest he referred to was "the stimulation by writing or pornographic books to sexual misconduct or instilling lustful feelings" [R. 324a].

Asked on cross-examination by the defense counsel whether the authoress' view toward sexual practice was widely held by other commentators on sex, he answered, "I don't know the exact number, but those men that I associate with rather closely do not hold to this type of sexual behiavior. I would say that the majority of psychiatrists that I am in contact with do not approve of say abnormal, aberrant sexual acts." [R. 327a].

Dr. Ann Hankins Ford, a psychiatrist, testified that she had read "The Housewife's Handbook," and that in her opinion it had no medical value. In the field of psychiatry in which she was involved (disturbed persons) it would be a destructive book [R. 337a, 339a]. In her opinion the authoress was emotionally very immature, a very disturbed person, who had not progressed emotionally from the age of childhood when people are in a normal homosexual stage [R. 337a]. Asked if the book had any medical message to it, she replied the only message she found in the book was "if you are dissatisfied with your husband look around and get some other man" [R. 338a]. "The clitoris is a remnant of the male penis from fetal development and this is so emphasized in this book, it is the only penis this woman has, and she all but works it to death. She must have this recognized. She must have great male attention paid to her substitute penis, and in this way she is not

making love to the men. This is not a lovers' relationship; it is a matter of demeaning, sullying these men whom she comes in contact with." [R. 338a]. The author is so confused and far from understanding what her problem is that it would reinforce the anguish and feelings of hostility" that patients in a similar situation had [R. 338a]. It would not have any value in the treatment or counseling of her patients but would be more disturbing to them [R. 338a].

Reverend Adolph Emil Kannwischer, a Baptist minister and Professor of Psychology, testified that he would not use the "Housewife's Handbook" in counseling parishoners or people because he regarded it was detrimental to a person who already was having problems. He saw no positive value in it [R. 344a].

The United States Government rested its case.

The Assistant United States Attorney's motion to strike Exhibits D-1 through D-43 and the testimony of the expert witnesses regarding responses of the average person and community standards was refused [R. 347a].

The defense attorney's motion for a judgment of acquittal was refused [R. 348a].

The trial judge found the defendants guilty on all counts. The trial court's opinion appears at R. 355a and in *United States v. Ralph Ginzburg et al.*, 224 F. Supp. 129 (Nov. 21, 1963). On December 19, 1963, the trial judge sentenced petitioner Ginzburg to five years' imprisonment and a fine of $28,000. and fined the corporate defendants $500 on each count [R. 373a-376a]. (A notice of appeal was filed on the same day). [R. 380a].

The United States Court of Appeals, Third Circuit, affirmed the judgment of the District Court in *United States v. Ralph Ginzburg et al.*, 338 F. 2d 12 (Nov. 6, 1964). This opinion appears at R. 385a.

Summary of Argument.

I.

The public policy of the United States Supreme Court has always championed the obscenity laws. Yet with all of this case law support, the communities are being inundated by a horde of obscenity which the law is not reaching.

The prosecutors are claiming that they have no remedy and that the Supreme Court stands too eager to reverse their successes, when they occur. *Amicus* do not picture this to be the true situation.

This Court recognizes that the debasement of sex has been with mankind down through the centuries and that the obscenity laws are necessary for a strong community life. The *Roth-Alberts* decision is testimony of the fact that criminal penalties are authorized procedures to regulate this type of conduct.

Most of the recent cases before this Court since 1957 have involved "previous restraint" controls, such as movie licensing cases, search warrant procedures, the right of the postmaster to refuse mail on the grounds it is obscene, etc. Whereas an earlier Court in *Near v. Minnesota* had indicated "previous restraint" could clearly be employed against obscene materials, this modern Court has restricted that interpretation considerably by procedural rules. In doing so, a number of obscenity judgments were reversed on procedural grounds, making it appear that this Court was releasing the matter as

not being obscene. Such decisions have misled and discouraged prosecutors.

In several cases the justices have been unable to agree on an "Opinion of the Court." The theories of the case set forth by the individual justices do not lead to an orderly understanding of the law.

On the other hand, this Court has denied review in at least 21 criminal cases which have come before it since 1957. These cases were without opinion and have not been publicized. They are not generally known to the individual prosecutors, who lose heart when they see all losses and no victories.

Then too, some prosecutors do not recognize the distinction between criminal prosecutions and previous restraint cases. A favorable written opinion confirming the trial court's findings in this criminal case is essential to the people's cause if we are to break the stalemate. The prosecutors need a direct signal from the Court, that they can retain their victories in criminal cases.

II.

Petitioners waived a jury at the outset and placed their fate in the hands of the trial judge. They should not be allowed to argue on appeal issues which would not have been available to them had a jury tried the matter.

The trial judge was receptive to all that the petitioners had to offer in the way of evidence. He was not required to accept their theory of the case, in view of

the subject matter and conduct of the petitioners, which spoke for itself.

If this Court, in its decision in *Roth-Alberts* actually passed upon the obscenity *vel non* of such subject matter, that case should be controlling here, because of the similarity of the material and operations of the petitioners.

The trial court properly followed the *Roth* standards in holding petitioners' three publications obscene. Evidence of the purpose of the publisher in regard to one publication is probative as to his purpose in the other two, as a common scheme or plan.

Redeeming social value is not determined in a vacuum, but depends upon all of the circumstances. The variable nature of obscenity requires this. The obscene portions of the material must be balanced against its affirmative values in determining the predominant appeal taken as a whole.

ARGUMENT.

I.

An Integrated Review of the Obscenity Case Law.

A. Public Policy.

The public policy of this Court has always championed the obscenity laws. See *Rosen v. U. S.*, 161 U.S. 606 (1896),[1] decided by the U.S. Supreme Court at the turn of the century. This favored policy is not difficult of understanding. Central to our heritage is the expectation that our Courts should strive to preserve our heritage and should not give scandal[2] by tolerating anything which tends to debase public morals.

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[1]Rosen attempted to escape a jury conviction on an obscenity charge on a technicality. He sought his freedom on appeal, arguing that, because the People had not described the obscenity in their complaint (referred to by the court as "the record"), he had not been properly informed of the nature of the crime. United States Supreme Court Justice John Marshall Harlan, grandfather of the present United States Supreme Court Justice John Marshall Harlan, rejected this plea out of hand and, in invoking the unanimous rule of the courts at that time, drew from the language of an earlier Massachusetts Supreme Court decision at page 608:

> "It can never be required that an obscene book and picture should be displayed upon the records of the court. . . . This would be to require that the People itself should give permanency and notoriety to indecency in order to punish it."

His Massachusetts reference was the first recorded case in the United States against a book, *Commonwealth v. Holmes*, (1821). The book in the Massachusetts case was "Fanny Hill," a century and a half later to find its way before this Court in *A Book Names "John Cleland's Memoirs of A Woman of Pleasure" v. Attorney General of Massachusetts*, October Term, No. 368.

[2]Webster's Collegiate Dictionary, Fifth Edition, defines "scandal" as "The distressing effect on others of unseemly or unrighteous conduct; especially, an occasion of another's lapse in faith or morals as to give scandal to one's children . . . 3. That which offends established moral conceptions or disgraces all who are associated or involved." Tolerance of indecency, for any reason, even for purposes of administration, had the undesirable effect of giving notoriety and acceptance to the material and dignifying its appearance.

Less than 35 ears ago this Court underscored this same "favored position" of the obscenity laws when, in *Near v. Minnesota*, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931)[3] the members of that Court made it clear that immunity from previous restraint did not extend to obscene publications.

Eleven years later, not one member of the 1942 Court entertained any doubt that the existence of obscenity was contrary to the people's abiding interest in good public morals. Neither the prevention of publication (previous restraint) nor criminal punishment for dissemination raised any constitutional problems in their view. In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 86 L. Ed. 1031, 62 S. Ct. 766 (1942) that Court said at page 571:

> ". . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ."

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[3]"The objection has . . . been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. *But the limitation has been recognized only in exceptional cases.* 'When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.' Schenck v. United States, 249 U.S. 47, 52. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. *On similar grounds, the primary requirements of decency may be enforced against obscene publications.*" (Our emphasis.)

Ten years later, the majority of the members of the 1952 Court in *Beauharnais v. Illinois*, 343 U.S. 250, 72 S. Ct. 725, 96 L. Ed 919 (1952) agreed with the *Chaplinsky Court*, adding:

> "Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances (clear and present danger) . . ."

When, five years later, in *Roth v. U.S.* and *Alberts v. California*, 354 U.S. 476, 77 S. Ct. 1314, 1 L. Ed 2d, 1498 (June 24, 1957), this present Court was faced with a broadside attack on the statutes guarding public decency, seven members of this modern court stood firm and enunciated a solid distaste for obscenity. *Rosen v. U.S. (supra), Near v. Minnesota (supra), Chaplinski v. New Hampshire (supra),* and *Beauharnais v. Illinois (supra)* were all confirmed. The language of *Rosen* was cited with approval. Everyone was charged with notice of what must be deemed obscene. The *Roth-Alberts* majority opinion placed emphasis on the language of *Chaplinski* noted above. Obscene utterances were of such slight social value as a step to truth that any benefit to be derived from them was clearly outweighed by the social interest in order and morality. The above language of the *Beauharnais* Court was cited with approval. No one could contend that obscene speech could be punished only upon a showing of a clear and present danger.

Under such a regime, it did appear as though the communities had the proper defense mechanisms and the modern assault on public morality could easily be turned back.

Yet with all this unanimity, elegance of language, and profuseness of citation to buttress the foundations of our anti-obscenity fortresses, the stockades are presently in danger of collapsing for lack of riflemen, abetted by confusion. The communities of this nation, eight years later, find themselves with a horde of filth, printed, visual, vocal and otherwise, of unprecedented force, threatening to erode the very foundations of the basic morality upon which our nation and our Constitution were founded.[4] In the face of this peril the public prose-

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[4] "A tide of printed filth is advancing across the land in a way which should give every wholesome-thinking person cause to wonder whether it may not erode the very foundations of the basic morality upon which our nation and our Constitution were founded.

In bookstores, railroad stations, air terminals, drug stores, everywhere that print is displayed and pictures revealed, there stand pyramids of smut, pornography and obscenity contaminating the very air in which they rest. Language which would be too raw and grating for the dives of opium-smoking debauchees degrades and defaces the paper which carries it.

Magazines with pictures and sketches that would disgrace oriental harems are sold to children as if they were as innocuous as bags of popcorn. Exotic rites that would bring the blush of shame to the faces of the most primitive tribes are described with nonchalance in high-priced books, medium-priced books, and low-priced books. Themes which should be the subject only for clinical studies in the hospitals for the criminal insane are turned into scarifying stories which are bound to bring harm to the youths into whose hands they fall.

Acts of degeneracy and unnatural conduct are being portrayed in contemporary literature as if they were normal and accepted practice in civilized life. Adultery and every other type of illegal and sinful conduct is being depicted glamorously, as if calling for emulation.

The healthful, romantic, and poetic relationship between man and woman is being treated in the basest and most animalistic terms.

Under the false guise of instruction and knowledge, so-called manuals on marriage are being turned out in myriads of copies for the sole purpose of appealing to prurient and lascivious minds. The sick outpourings of degenerate brains are being bound in hardback books and paperback books and sometimes in elegant and expensive leather. Titles and cover pictures which in themselves

cutor bleats that he has no remedy and that it is useless to prosecute, since the Supreme Court will reverse the jury's findings.

CDL is at complete odds with such ideology. Unlike our knowledge of outer space, which is increasing in geometric proportions through discoveries in space explorations, our knowledge of sex is profound, for sex has been with us since the beginning of mankind. As to the sexual relation, it can be said, with some degree of truth, that there is "nothing new under the sun." Similarly, the assault which has as its objective the debasement of sex has been with mankind down through the centuries. That which motivates the pornographer, in 1965, motivated John Cleland two centuries earlier. Recognition of the universal need for strong community

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are suggestive, pornographic, indecent and obscene shout their vulgarity to passersby.

It used to be that pornographic literature, to the extent that it existed, was sold clandestinely. The secrecy and the furtiveness with which it was sold and circulated was an indication that the public looked upon it as something improper and not in consonance with the morals of the community. But now the most salacious books, the most degrading publications are sold in book stores, drug stores, five and ten cent stores, and at the newsstands. It is difficult to think of a place where print appears that one's eyes and spirit will not be assailed by pornography of the vilest character.

In short, a wide river of filth is sweeping across the nation, befouling its shores and spreading over the land its nauseating stench. But, what is most disturbing of all, is that persons, whose noses should be particularly sensitive to this olfactory assault, do not smell it at all. I refer to district attorneys and prosecuting officers throughout the nation. Of course, there are a large number of district attorneys in the country who are doing their duty and doing it well, but a larger number of prosecuting officials are shrugging unconcerned shoulders at this violent assault on law, morality and decency."

. . . From an address given by Associate Justice Michael A. Musmanno of the Pennsylvania Supreme Court at the Waldorf-Astoria New York City on October 23, 1965.

controls in this modern era has amply been witnessed by this Court in *Roth-Alberts* when it said at page 484:

> "But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 states, and in the 20 obscenity laws enacted by the Congress from 1942 to 1956. . . ."

Nevertheless, there is, in our opinion, a crisis facing this nation which requires the members of this Court to bear witness through concrete action and to drive home, once and for all, the basic fact, which is escaping so many at the present time, that this Court really has not, in its decisions since *Roth-Alberts* underwritten the sale of "perversion for profit."

If we understand correctly what has occurred in the ensuing years since *Roth-Alberts*, this Court has not altered the basic position taken by it in those cases; namely that criminal cases which applied the proper standard for judging obscenity, did not offend constitutional privileges. This Court held at page 492:

> "In summary then, we hold *that these statutes, applied according to the proper standards for judging obscenity, do not offend constitutional safeguards against convictions* based upon protected material, or fail to give men in acting adequate notice of what is prohibited. . . ." (Our emphasis).

B. The Problem of Previous Restraint Cases.

Unfortunately, a line of cases followed which enjoyed in common the element of previous restraint,[5] a factor not present in the *Roth* and *Alberts* cases, which authorized criminal penalties as the just consequences of the defendants' temerous conduct. This Court did not react as favorably to this new issue as the earlier Courts in *Near v. Minnesota (supra)* which had *excluded previous restraint controls* in the case of *obscene publications from the operation of the Blackstone rule,* which held that:

"The liberty of the press is indeed essential to the

[5]Previous (prior) restraint was a major issue in each of the following: *Times Film Corporation v. City of Chicago,* 355 U.S. 35, 78 S. Ct. 115, 2 L. Ed. 2d 72 (1957) (Movie license—no opinion), reversing 244 F. 2d 432 (7th Cir. 1957) and 139 F. Supp. 837 (1956); *Mounce v. U. S.,* 355 U.S. 180, 2 L. Ed. 2d 187 (1957) (customs case—no opinion), reversing 247 F. 2d 148 (9th Cir. 1957) and 134 F. Supp. 490 (1955); *One Inc. v. Olesen,* 355 U.S. 371, 78 S. Ct. 364, 2 L. Ed. 2d 352 (1958) (right to deposit mail—no opinion) reversing 241 F. 2d 772 (9th Cir. 1957); *Sunshine Book Co. v. Summerfield,* 355 U.S. 372, 78 S. Ct. 365, 2 L. Ed. 2d 352 (1958) (right to deposit mail—no opinion) reversing 249 F. 2d 114 (D.C. Circuit 1957) and 128 F. Supp. 564 (1955); *Times Film Corp. v. City of Chicago,* 365 U.S. 43, 81 S. Ct. 391, 5 L. Ed. 2d 403 (Jan. 23, 1961) (movie license) reversing 272 F. 2d 90 (7th Cir. 1959) and 180 F. Supp. 843 (1959); *Marcus v. Kansas City Search Warrants,* 367 U.S. 717, 81 S. Ct. 1708, 6 L. Ed. 2d 1127 (June 19, 1961) (Seizure), reversing 344 S.W. 2d 119 (1960); *Manual Enterprises Inc. v. Day,* 370 U.S. 478, 82 S. Ct. 1432, 8 L. Ed. 2d 639 (June 25, 1962) (right to deposit mail), reversing 289 F. 2d 455 (D.C. Circuit 1961) *Bantam Books Inc. v. Sullivan,* 372 U.S. 58, 83 S. Ct. 631, 9 L. Ed. 2d 584 (Feb. 18, 1963) (Warnings) reversing 176 A. 2d 393; *A Quantity of Books v. Kansas,* 378 U.S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809 (June 22, 1964) (Seizure), reversing 191 Kan. 13, 379 P. 2d 254 (1963); *Freeman v. Maryland,* 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (Mar. 1, 1965) (Movie license), reversing 233 Md. 458, 197 A. 2d 232 (1964); *Trans-Lux Distributing Corp. v. Board of Regents of the University of New York,* 380 U.S. 259, 85 S. Ct. 952, 13 L. Ed. 2d 959 (1965) (movie license—no opinion).

> nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity" 4 Bl. Com. 151, 152.

The cloud of confusion which was to appear was forecase in *Kingsley Book Inc. v. Brown,* 354 U.S. 436, 77 S. Ct. 1325, 1 L. Ed. 2d 1469 (June 24, 1957), decided on the same day with *Roth-Alberts.* In that case, this Court split five-to-four in approving the New York injunctive action, which authorized limited previous restraint. It was here that Justice Brennan and Warren parted company with the majority in the *Roth* and the earlier Courts.

The confusion and disruption commenced one year later with the *per curiam* reversals without opinion in the *Times Film Corporation, One Inc.,* and *Sunshine Book Co.* cases[6] (cited in footnote 5). Later written

[6]For example, the claim is widespread that Sunshine Book Company stands for the proposition that nudist magazines are not obscene, no matter what may be the publisher's or disseminator's intent, the format, method of distribution, policy of the state etc. See here the recent result in *Connecticut v. Martin et al.* (June 17, 1965), where the Appellate Division of the Circuit Court reversed (2-1) an extremely well reasoned trial court opinion, solely upon the basis of the *Sunshine Book Co.* case. We believe such claim to be utterly groundless. See *Outdoor American Corporation v. City of Philadelphia,* 333 F. 2d 1963 (June 30, 1964) certiorari denied 85 S. Ct. 192, 13 L. Ed. 2d 176 (Nov. 9, 1964); *Luros v. Hanson,* petition for certiorari filed Sept. 27, 1965, Oct. Term, 1965 No. 620; *Hadley v. Arkansas,* 205 Ark. 1027, 172 S.W. 2d 237 (1943); *King v. Commonwealth,* 233 S.W. 2d 522 (Oct. 20, 1950); *Missouri v. Becker,* 364 Mo. 1079, 272 S.W. 2d 283 (1954), cited with approval in

opinions in *Marcus, Manual Enterprises, Inc.* and *A Quantity of Books* gave specific recognition to the fact that the obscenity issue was not reached in this Court's reversals of those lower Court judgments on previous restraint grounds. What factor the previous restraint element played in the 1958 decisions will never be known.[7] Subsequent opinions have revealed a common disagreement between the justices on what constitutes the vital phase of the case. See the No Clear Majority Decisions, *infra*. Then too, the Court's membership has changed.[8]

As breeding grounds, the 1958 *per curiam reversals* acted with catalytic action to spawn the "hard core pornography" rule in one of the major centers of pornopraphic production in the United States. *New York v. Richmond County News Co.*, 175 N.E. 2d 681 (May 25,

Roth-Alberts at footnote 26; *Sunshine Publishing Co. v. George N. Parris* (unreported, Circuit Court, Macomb County April 29, 1963); *Nebraska v. Jungclaus*, 176 Neb. 641, 126 N.W. 2d 858 (Mar. 13, 1964); *Dale Book Co. v. Leary*, 233 F. Supp. 754 (Aug. 12, 1964); *City of Phoenix v. Fine* (unreported, Superior Court Maricopa County, Arizona (Jan. 22, 1965); *Missouri v. Vollmar*, 389 S.W. 2d 20 (Mar. 8, 1965); *Virginia v. Dave Rosenbloom* (unreported, Suffolk County, Richmond, Virginia, June 10, 1965); *Arizona v. Arizona Magazine Distributors Inc.* (unreported, West Phoenix Justice Court, Maricopa County, (Aug. 26, 1965); *Arizona v. Al Sacks* (unreported, West Phoenix Justice Court, Maricopa County (Sept. 1, 1965).

[7]The *per curiam* decisions are criticized in "Obscenity, Pornography and Censorship by Thomas R. Mulroy of the Illinois Bar in 49 American Bar Association Journal (Sept. 1963) at 869. The author cites Justice Jackson's remarks on the empirical reversal of a case without opinion in *Brownell v. Singer*, 347 U.S. 403 (1954):

> "The Court's one-word decision reverses concurring judgments of three highly respected courts . . . (by citing) a single case. . . . I think this Court owed those Courts and the legal profession something more than reference to an inapplicable decision."

[8]Justices Frankfurter, Whittaker and Burton have been replaced by Justices Fortas, White and Stewart.

1961.)[9] Abetted by a misconstruction of the no clear majority opinion decision in the *Manual Enterprises Inc.* case and a misapplication of the special view entertained by Justice Harlan in federal cases, the "hard core pornography" rule spread to the other major centers of pornographic production. *Zeitlin v. Arnebergh*, 59 Cal. 2d 901, 31 Cal. Rptr. 800 (July 2, 1963).[10]

C. The No Clear Majority Decisions.

The common disagreement between the justices has given birth to a number of "no clear majority" decisions which confound and confuse.[11] *Manual Enter-*

[9]There is reason to believe that had Justice Desmond recognized the significance of the previous restraint issue in the 1958 cases, his deciding vote would have been cast differently and the minority in that case would have prevailed. See Justice Desmond's concurring opinion in the *Richmond County News Co.* case, his concurring opinion in *People v. Fritch*, 13 N.Y. 2d 119 (June 10, 1963), and his dissenting opinions in *Larkin v. G. I. Distributors Inc.*, 14 N.Y. 2d 869 (June 10, 1964); *Larkin v. G. P. Putnam's Sons*, 14 N.Y. 2d 399 (July 10, 1964); *People v. The Bookcase Inc. et al.*, 14 N.Y. 2d 409 (July 10, 1964).

[10]That the California Supreme Court misinterpreted the Harlan view seems apparent from Justice Harlan's vote to deny certiorari in *Grove Press Inc. v. Gerstein*, 378 U.S. 577 (June 22, 1964), a state case. The language of the *Zeitlin* case suggests however, that the author would have come by the same result no matter how he chose to interpret Justice Harlan's opinion in the *Manual Enterprises case.*

[11]One of the basic postulates of the American case law system is that the decision of a majority determines the result, and an "opinion of the court" is written expressing the reasoning agreed upon by the majority. When a majority agree on the result, the decision is final as between the litigants. When a majority agree in the reasoning for the result, the opinion which expresses this reasoning is called the "opinion of the court." If a majority agree on the result, but do not agree in the reasoning for the result, there is no "opinion of the court," even though the controversy is ended as between the parties to the lawsuit.

The decision plus the reasoning found in the "opinion of the court" determine the precedent value of any particular case. In many obscenity cases, however, there has been no "opinion of

prises Inc. v. Day, 370 U.S. 478, 82 S. Ct. 1432, 8 L. Ed. 2d 639 (1962); *Jacobellis v. Ohio*, 378 U.S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964); *A Quantity of Books v. Kansas*, 378 U.S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809 (1964); *Grove Press Inc. v. Gerstein*, 378 U.S. 577, 84 S. Ct. 1909, 12 L. Ed. 2d 1035 (1964); *Tralins v. Gerstein*, 378 U.S. 576, 84 S. Ct. 1903, 12 L. Ed. 2d 1033 (1964). The order in appearance of an opinion, rather than solid precedent, often controls the destiny of the people's defenses against the assaults on public morality.[12]

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the court," as where the majority have agreed *only* upon the *result*, (*i.e.*, judgment reversed) but have not been able to agree upon the supporting reasoning.

Text books on judicial precedent indicates that theoretically the "no-clear-majority" decision stands only for its general result. See Wambaugh, *The Study of Cases* (Second Edition, 1894), at page 50:

> "Even when all the judges concur in the result, the value of the case as an authority may be diminished and almost wholly destroyed by the fact that the reasons given by the several judges differ materially. . . . 'There must be a concurrence of a majority of the judges upon the principles, rules of law, announced in the case, before they can be considered settled by a decision. If the court is equally divided or less than a majority concur in a rule, no one will claim that it has the force of the authority of the court.'"

See also Black, *Handbook of Judicial Precedent* (1912), pages 135-136:

> "If all or a majority of the judges concur in the result . . . but differ as to the reasons which lead them to this conclusion, the case is not an authority except upon the general result."

[12]The confusion of the State courts as to what is taking place in the United States Supreme Court is spotlighted in *Arizona v. Locks*, 97 Ariz. 148, 397 P. 2d 949 (Dec. 30, 1964). That court said, in error, at page 951:

> "This was followed by *Manual Enterprises Inc. v. Day*, 370 U.S. 478 . . . *holding* the publication of photographs of nude male figures designed to appeal to homosexuals not to be so obscene as to lose the protection of the First Amendment. (Our emphasis)."

The Arizona Supreme Court's reversal of a jury decision on girlie magazine subject matter was based largely on a comparison with this erroneous reference and belief that Justice Harlan's opinion was the opinion of the Court. The Arizona Court had indicated a different view on the subject matter when the case was before it previously in 372 P. 2d 724 (June 20, 1962) and 382 P. 2d 241 (May 25, 1963).

D. A Major National Problem.

In the absence of knowledgeable defending riflemen, compounded by the confusion, those well-buttressed fortresses are being subjected to a withering attack. On October 21, 1965, the Los Angeles County Grand Jury returned a two count indictment against 14 defendants in *California v. Milton Luros, et al.*, Superior Court case No. 295,183, for conspiracy to manufacture and distribute girlie magazines, nudest magazines and nine lesbian-type paperback books (including Fanny Hill). On February 15, 1965, the count covering the girlie and nudist magazines was dismissed without trial in a pre-trial motion to dismiss the indictment. Superior Court Judge Walter R. Evans, in dismissing, had this to say:

> "In view of the time I have had to study it, I have found it extremely interesting, but absolutely amazing. I was concerned as to the extent to which the United States Supreme Court—I am very frank to say, and I think I am entitled to say it, that I disagree wholeheartedly with the United States Supreme Court cases. I think the so-called founding fathers who promulgated our Constitution probably would turn over in their graves if they saw the extent to which the United States Supreme Court has stretched the protection to this type of material which to me, has no value to anybody. However, that is my personal position. I want to get that off my chest. I think there is nothing but filth from beginning to end in this material. However,

that is my personal opinion, and I think that counsel pointed out that I still have an obligation to follow what I think are the rules laid down by the United States Supreme Court. I was interested in reading one of the learned justices who said that maybe some day the balance will start swinging back where honesty and decency would start entering into a consideration of this thing. I hope it will."

He thought eight of the lesbian-type paperbacks (but strangely, not Fanny Hill) a jury issue, and Count 2 was set for trial. The people's action was short lived however. Although both the District Court of Appeal and the California Supreme Court thereafter refused the defendants a writ of prohibition on the count involving the lesbian-type paperback books, Trial Judge Joseph Sprankle dismissed the case, without trial on June 14, 1965. The books' titles, Lesbian Sin Song, Two Women in Love, Counterfeit Lesbian, Lesbian Captive, Lesbians in White, The Girls at Wendy's, The Three Way Apartment and Honey Lips, sung out the perversion they peddled.

In another action by the people—this time against a notorious national disseminator located in New York—a criminal obscenity indictment was short-circuited by trial judge J. Irwin Shapiro, when he dismissed *New York v. Ray Kirk, Birch, All State News Co. Inc., et al.*, 40 Misc. 2d 626, 243 N.Y.S. 2d 525 (Sept. 6, 1963) without trial. In so holding, Judge Shapiro refused to follow controlling precedent in his state, for one of the books supporting the indictment had already been held obscene by New York's highest court in *New York v. Harry Fried*, 18 A. 2d 996, 238 N.Y.S. 2d 742 (Mar. 26, 1963). Appeal dismissed for want of jurisdiction.

Treating the paper whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied (Justice Black, Douglas and Stewart are of the opinion probable jurisdiction should be voted and judgment reversed 378 U.S. 578, 84 S. Ct. 1904, 12 L. Ed. 2d 1033 (June 22, 1964).[18]

E. A Problem of Communication.

The confused results reached in the lower courts noted above does not seem warranted to CDL, when one considers the overwhelming weight of case law in the opposite direction. The key to an awakening of law enforcement seems bound up in the remarks of Chief Justice Warren in *Jacobellis v. Ohio (supra)* at page 1684:

". . . This Court hears cases such as the instant one not merely to rule upon the alleged obscenity

[18]Federal courts are equally confused. See *United States v. Klaw and Jack Kramer*, 350 F. 2d 155 (2nd Circuit July 15, 1965) and *Haldeman v. U.S.*, 340 F. 2d 59, 62 at fn. 6 (10th Cir. Jan. 13, 1965):

"Mr. Justice Stewart, concurring in Jacobellis, declined to define the term 'hard-core pornography,' but stated: 'I know it when I see it . . .' The writer of this opinion has also felt that he would 'know it when he saw it' but a reading of some of the published material held to be constitutionally protected tends to raise doubts regarding one's perceptive abilities in such matters . . ."

When District Judge George Templar found himself reversed as the trial judge in the *Haldeman* case, he turned around and dismissed two major federal grand jury indictments against nationally notorious smut peddlers: Louis Linetsky aka John Amslow & Co. in *United States v. Linetsky*, No. T-CR 582 (D.C. Kansas) (June 24, 1965) and an equally notorious smut merchant in *United States v. Wasserman* (D.C. Kansas) No. T-CR-581 (June 29, 1965). The former involved girlie magazines and illustrations of females in the nude and the latter involved motion picture films, compare these results with *Roth-Alberts (supra)*; *Frank L. Collier v. U.S. (infra)*; *Herman L. Womack v. U.S. (infra)*; *Chobot v. Wisc. (infra)*; *Roy A. Oakley v. U.S. (infra)* *Monfred v. Maryland (infra)*; *Heinecke v. U.S. (infra)*; *Goldstein v. Virginia (infra)*; *Wenzler and Imlay v. Calif. (infra)*.

of a specific film or book but to establish principles for the guidance of lower courts and legislatures. *Yet most of our decisions since Roth have been given without opinion and have thus failed to furnish such guidance. . . .*" (our emphasis).

With the exception of the four *per curiam* decisions in 1958, the only obscenity decisions since Roth-Alberts which have been without opinion, were those in which this Court has dismissed an appeal or denied certiorari. This Court should call attention to these decisions denying certiorari and dismissing appeals. In so far as we have been able to ascertain they are 21 in number:

John G. Matthews v. Florida, writ of certiorari denied 356 U.S. 918, 78 S. Ct. 702, 2 L. Ed. 2d 714 (March 31, 1958), notwithstanding the similarity of the statute to the Michigan Statute in *Butler v. Mich.,* 352 U.S. 80;

Wyman Hulan Parr v. U.S. (film), 255 F. 2d 86, writ of certiorari denied 358 U.S. 824, 79 S. Ct. 40, 3 L. Ed. 2d 64 (Oct. 13, 1958);

Max Padell v. U.S. (paperback books), 262 F. 2d 357, writ of certiorari denied 359 U.S. 942 79 S. Ct. 723, 3 L. Ed. 2d 676 (March 23, 1959);

Robert H. Cain v. U.S., 274 F. 2d 598, writ of certiorari denied 362 U.S. 952, 80 S. Ct. 864, 4 L. Ed. 2d 869 (April 18, 1960);

Samuel R. Hochman v. U.S. (paperback books: "The Sex Factory" and "Virgins Come High") 277 F. 2d 631, writ of certiorari denied (Justices Black and Douglas voted to grant certiorari) 364 U.S. 837, 81 S. Ct. 70, 5 L. Ed. 2d 61 (Oct. 10, 1960) rehearing denied, 364 U.S. 906, 81 S. Ct. 231, 5 L. Ed. 2d 199 (Nov. 21, 1960);

Frank L. Collier v. U.S. (photographs of nude young men) 283 F. 2d 780, writ of certiorari denied 365 U.S. 833, 81 S. Ct. 746, 5 L. Ed. 2d 744 (March 6, 1961);

Herman Womack v. U.S. (photographs of nude young men) 294 F. 2d 204, writ of certiorari denied 365 U.S. 859, 81 S. Ct. 826, 5 L. Ed. 2d 822 (March 27, 1961);

Astore v. U.S. (film) 288 F. 2d 26, writ of certiorari denied, 366 U.S. 925, 81 S. Ct. 1352. 6 L. Ed. 2d 384 (May 15, 1961);

Joseph Chobot v. Wisconsin (girlie magazines: "Spice" "Adam" "Spree" and "Blondes, Brunettes, and Redheads") 12 Wis. 2d 110, 106 N.W. 2d 286, appeal dismissed for lack of a federal question (Justices Black, Douglas and Harlan voted for probable jurisdiction), 368 U.S. 15, 82 S. Ct. 136, 7 L. Ed. 2d 85 (Oct. 23, 1961) rehearing denied 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198 (Dec. 4, 1961);

Roy A. Oakley v. U. S. (unretouched photographs of naked young women) 290 F. 2d 517, writ of certiorari denied 368 U.S. 888, 82 S. Ct. 139, 7 L. Ed. 2d 87 (Oct. 23, 1961) rehearing denied, 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198 (Dec. 4, 1961);

Harry Monfred et al. v. Maryland (girlie magazines: "Candid" "Consort" "Sextet" "Cloud 9" "Torrid"), 226 Md. 312, 173 A. 2d 173, writ

of certiorari denied 368 U.S. 953, 82 S. Ct. 395, 7 L. Ed. 2d 386 (Jan. 8, 1962);

Alfred J. Heinecke v. U.S. (Photographs of nude young men—similar to *U.S. v. Womack*) 294 F. 2d 727, writ of certiorari denied (Justices Black and Douglas voted to grant certiorari), 368 U.S. 901, 82 S. Ct. 173, 7 L. Ed. 2d 96 (Nov. 6, 1961);

Harold S. Kahm v. U.S. (for description of subject matter, see 300 F. 2d 78 at 82), 300 F. 2d 78, writ of certiorari denied 369 U.S. 859, 82 S. Ct. 949, 8 L. Ed. 2d 18 (April 23, 1962);

Louis Finkelstein et al. v. New York (paperback books: "Garden of Evil" and "Queen Bee"), 229 N.Y.S. 2d 367, 183 N.E. 2d 661 writ of certiorari denied (Justice Douglas voted to grant certiorari), 371 U.S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 (Oct. 15, 1962);

Harold Zucker v. New York (3 sado-masochistic books similar to 50 books involved in *New York v. Mishkin*, also before this court), writ of certiorari denied (Justice Douglas voted to grant certiorari) 371 U.S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 (Oct. 15, 1962);

Arthur Goldstein v. Virginia (girlie magazines) writ of certiorari denied 372 U.S. 910, 83 S. Ct. 726, 9 L. Ed. 2d 720 (Feb. 18, 1963);

Edward Mishkin v. U.S. (books not named), 317 F. 2d 634, writ of certiorari denied 375 U.S. 827, 84 S. Ct. 71, 11 L. Ed. 2d 60 (Oct. 14, 1963);

John Darnell, II, v. U.S. (obscene letter), 316 F. 2d 813, writ of certiorari denied (Justice Douglas voted to grant certiorari), 375 U.S. 916, 84 S. Ct. 205, 11 L. Ed. 2d 155 (Nov. 12, 1963), rehearing denied, 375 U.S. 982, 84 S. Ct. 493, 11 L. Ed. 2d 429 (Jan. 6, 1964);

Nirvana Ward Zuideveld v. U.S., 316 F. 2d 873, writ of certiorari denied, 376 U.S. 916, 84 S. Ct. 671, 11 L. Ed. 2d 612 (Feb. 17, 1964);

Harry Fried v. New York (paperback books: "College for Sinners" "Sex Cat" and seminude photographs of women), 238 N.Y.S. 2d 742, appeal dismissed for lack of jurisdiction. Treating the papers wherein the appeal was taken as a petition for writ of certiorari, certiorari is denied (Justices Black, Douglas and Stewart are of the opinion that probable jurisdiction should be noted and judgment reversed), 378 U.S. 578, 84 S. Ct. 1904, 12 L. Ed. 2d 1033 (June 26, 1964);

Samuel Dodd Williamson v. California (paperback book: "Fear of Incest"), 207 Cal. App. 2d 839, 24 Cal. Rptr. 734, writ of certiorari denied (Justice Doulas voted to grant certiorari), 377 U.S. 994, 84 S. Ct. 1902, 12 L. Ed. 2d 1047 (June 22, 1964), rehearing denied .... U.S. ...., 85 S. Ct. 13, 13 L. Ed. 2d 77 (Oct. 12, 1964);

Harold Eugene Wenzler, Sr., and John Imlay v. California (8 mm movie, 12 minutes—"First Fling" described as girlie magazine subjects in motion) writ of certiorari denied (Justice

> Douglas voted to grant certiorari), 377 U.S. 994, 84 S. Ct. 1902, 12 L. Ed. 2d 1047 (June 22, 1964), rehearing denied, ... U.S. ...., 85 S. Ct. 14, 13 L. Ed. 2d 77 (Oct. 12, 1964).

There is rarely any mention made in a trial court or in a State Supreme Court of any of the criminal convictions, which this Court has refused to reverse, or the obscene matter involved in those cases. The rare exception is *Connecticut v. Andrews,* 150 Conn. 92, 186 A. 2d 546 (1962), which, in answer to the defendant's claim that the girlie magazines "Modern Man" (July 1960) and "Modern Man—Yearbook of Queens" were not obscene, said:

> "The defendant's claim that there were no obscene magazines to support his conviction on the first and second counts is without merit. Monfred v. State, 226 Md. 312, 317, 173 A. 2d 173, Cert. denied, 368 U.S. 953, 82 S. Ct. 395, 7 L. Ed. 2 386; State v. Chobot, 12 Wisc. 2, 110, 116, 106 NW2 286, dismissed, for lack of a substantial federal question, 368 U.S. 15, 82 S. Ct. 136, 7 L. Ed2 85. . . ."

The end result it that the people's cause suffers. The bad cases are highlighted and the good cases go unnoticed.

The Connecticut Supreme Court has recognized what in our opinion appears to be good logic and good law if the United States Supreme Court must, in each instance make a constitutional judgment as to whether any given subject matter is either, as a matter of law, protected speech; or a question of fact on the issue of obscenity, for the jury to decide, then a denial of review

(either by dismissal of an appeal or by denial of certiorari) places the material in the latter category.[14]

F. Reconciling the Cases.

When the obscenity statutes have been applied as *criminal statutes* trying "conduct," the People's case has met with no opposition from the United States Supreme Court, except in the case of *Jacobellis v. Ohio,* 378 U.S. 184, 84 S. Ct. 1674. Unfortunately, the United States Supreme Court has failed to publicize such results by way of formal opinion.

Justice Warren, in his dissenting opinion, in *Jacobellis v. Ohio,* 84 S. Ct. 1674 (June 22, 1964), makes it clear that this Court is not defending obscenity, but that *it only appears to do so* when it is faced with procedurally bad cases, at page 1685:

> "There has been some tendency in dealing with this area of the law for enforcement agencies to do only that which is easy to do— for instance, to seize and destroy books with only a minimum of protection. As a result, courts are often presented with procedurally bad cases and, in dealing with them, appear to be acquiescing in the dissemination of obscenity. But if cases were well prepared and were conducted with the appropriate concern for constitutional safeguards, courts would not hesitate to enforce the laws against obscenity."

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[14]The general rule of law that denial of certiorari means "nothing" or "nothing much," would seem to have little application in free speech cases. See *Supreme Court Practice,* 3rd Ed., Stern and Gressman, P. 182, where the authors discuss this point in writs of habeas corpus cases.

Our analysis points to a major point of distinction between those cases which draw into issue the conduct of an individual and those which involve "prior restraint." The final results have certainly been distinguishable. The seven year history points to a course of conduct which has meaning.

The "procedurally bad cases" referred to by Justice Warren were not criminal cases involving "conduct" but were the cases cited in footnote 5, involving "prior restraint." Where difficulty has been encountered, it has been in the area of "prior restraint" by administrative officials (motion picture censor boards and Postmaster cases and mass seizures under search warrants). "Due process" considerations were a major issue in such cases. See here, the four *Per Curiam* decisions in 1958 (prior restraint—no jury trial on the issue of obscenity; material kept from mails in preference to criminal trial for disseminating obscene material, vendor required to prove his right to distribute by injunctive action); *Marcus v. Kansas City Search Warrants*, 367 U.S. 717, (prior restraint—mass seizure under general search warrant, non-criminal proceeding aimed at destruction of subject matter rather than at conduct of vendor); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 48 (prior restraint—boycott, rather than criminal trial of vendor); *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (prior restraint—material kept from mails in preference to criminal trial for disseminating obscene material, vendor required to prove right to distribute by bringing an injunctive action); *A Quantity of Books v. Kansas*, 84 S. Ct. 1723 (prior restraint—mass seizure, non-criminal proceedings aimed at destruction of subject matter, rather than at conduct of vendor, no right to jury trial on issue of obscenity). *Freedman v. Maryland*, 380 U.S. 51 (prior restraint—movie censor board, exhibitor required to prove his right to exhibit by injunctive action); *Trans-Lux Distributing Corp. v. Board of Regents of New York*, 380 U.S. 259 (prior restraint—movie censor board, exhibitor required to prove his right to exhibit by injunctive action).

In all of these cases, the People could have brought the criminal action and held the defendant accountable for his "conduct" (with the procedural safeguards of criminal procedure, *i.e.*, jury trial and burden of proof) and avoided the prior restraint issue. They chose the "prior restraint" attack in preference, unaware that this Court's policy was to give *Near v. Minnesota* as narrow a construction as possible. Unfortunately, the disinterested prosecutor pictured above, at this late date, is unaware of this basic distinction in the case law. Furthermore, he is unwilling to pursue the distinction, though convinced by logic, without a more direct signal from this Court.

It appears symbolic therefore that, in this climate of stalemate, petitioners Ginzburg, *et al.* and Mishkin should now find themselves before this Court at the same time in criminal cases. Their respective operations are as unto *Roth* and *Alberts* as peas in a pod.[18]

This Court must now decide if it meant what it said when it put pornographers Roth and Alberts out of business in 1957.

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[18]The reporter's comments in the American Law Institute, Model Penal Code (1957 draft) section 207.10 at page 14 describes the obscenity offense:

> "The gist of the offense we envision, therefore, is a kind of 'pandering'"

which accurately discribes their separate activities. At page 13, the reporter comments:

> "The main purpose of Section 207.10 is to suppress commerce in the obscene. If production and circulation of obscene material for gain can be eliminated, the supply would be cut off at the source . . ."

II.

This Court Should Affirm the Judgment.

A. Introduction.

One should bear in mind at the outset that this is not the case of a defendant who has been deprived of a right to trial by a jury of his peers in the community in which the crime occurred. Under the Federal Statute, of which the Petitioners stand convicted, they had a clear right to a trial by 12 jurors and the benefit of the burden of proof in criminal cases, which requires the prosecutor to prove to each and every one of these 12 jurors, that the defendant's conduct was unlawful, beyond a reasonable doubt. They waived that right at the outset, but not without reason, for "defendants in obscenity cases want nothing so little as a jury trial"[18] XL Notre Dame Lawyer, No. 1 at page 10 (Dec. 1964). *Bromberg, Five Tests for Obscenity*, 41 Chicago Bar Record, 416, 418 (1960).

Having made that waiver, and placed their fate in the hands of the trial judge, they now argue on appeal that which would not be available to them in the case of a jury verdict. Though ever so subtle, the argument is that it was the subjective feelings of the trial judge which decided the matter, not the community's sense of responsibility.

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[18]"Defendant invariably recoils in horror at any suggestion that the question of obscenity be submitted to a jury. This leads one to question his sincerity for there is no better way of determining community standards of morality than the time-tested method of trial by jury . . ." Bromberg, Five Tests for Obscenity, 41 Chicago Bar Record 416, 418 (1960).

"Are they not telling the justices that they believe they can prevail only if the community standard is *not* applied? The Court hasn't gotten the message . . ." XL Notre Dame Lawyer No. 1, 10 (Dec. 1964).

At page 28 of their brief, the petitioners argue "'Customary limits of candor' are still measured by the type of material a trial judge would have in *his* library or upon *his* coffee table." At page 29: "Attempts to treat these concepts as objective standards and to offer evidence in traditional form on whether a particular work can, by such standards, be judged 'obscene' are rebuffed by triers of fact whose subjective reaction to the work is too strong to permit enlightenment by objective proof." At page 34: "Experts on mass culture . . . are in a much better position to know what society now tolerates than a judge whose personal reading habits may be quite different from those of the crowd." At page 43: "It does not appear that the trial court had any special knowledge on matters literary or artistic. What the trial judge did then was to 'arbitrarily disregard all the expert testimony in the record and rely upon his unsubstantiated personal beliefs instead of upon evidence . . ." Had the case been tried to a jury, their arguments would have been swallowed up in the jury verdict and the result should not be different here. Having waived the jury, petitioners should not be permitted to argue what a jury *would have found as to* "customary limits of candor," "what objective proof constitutes enlightenment," "what society tolerates," or "whether or not the jury would accept the offered expert testimony," as against what the trial judge *did in fact* find.

The petitioners find themselves in no better position than petitioner David Alberts who waived a jury trial in *Alberts v. California (supra)*. As to that defendant, this Court said at page 489:

> "Both trial courts below sufficiently followed the proper standard. Both courts used the proper def-

> inition of obscenity . . . in the Alberts case, in ruling on a motion to dismiss, the trial judge indicated that, as the trier of facts, he was judging each item as a whole as it would affect the normal person . . ."

A close reading of the trial transcript reveals no lack of receptivity on the part of the trial judge to the petitioners' efforts to "enlighten." That he should reject their theory of the case is understandable upon an examination of the evidence presented at the trial, including the exhibits, defendants' conduct in relation thereto, and the testimony.

B. The Roth-Alberts Facts Control.

Because the *Roth-Alberts* defendants and materials so closely resemble their counterparts in this and the *Mishkin* case, also before this Court in *Mishkin v. New York*, No. 49, they assume a particular relevance to the issues raised by these defendants. As to the materials involved in *Roth-Alberts*, see 45 Minn. Law Review, 5, 20, *et seq.* and footnotes 88-102.

In *United States v. Roth*, 237 F. 2d 796, 800 (Sept. 18, 1956) Judge Clark in the Court of Appeals, Second Circuit below, said of Roth and his materials:

> "As we have indicated, if the statute is to be upheld at all it must apply to a case of this kind where defendant is an old hand at publishing and surreptitiously mailing to those induced to order them such lurid pictures and material as he can find profitable. There was ample evidence for the jury, and the defendant had an unusual trial in that the judge allowed him to produce experts, including a psychologist who stated that he would

> find nothing obscene at the present time. Also various modern novels were submitted to the jury for the sake of comparison."

In his petition for certiorari, Roth raised an issue that the publications of which he stood convicted were not obscene.[17] One of the books was "American Aphrodite, Vol. 1, No. 3," whose description bears considerable resemblance to "Eros Vol. 1, No. 4."[18] This Court apparently did not consider Roth's claim substantial, for in granting the writ,[19] jurisdiction and arguments were limited[20] to three of the other issues in the jurisdictional statement.

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[17]Petition for Writ of Certiorari, pp. 2-3; 45 Minn. L. Rev. 5, 21.

[18]See 45 Minn. L. Rev. 5, 20, at footnotes 88, 89:

"88. The particular issue of *America Aphrodite* was volume 1, number 3, as correctly stated in count 24; the reference to 'Number Thirteen' in count 17 appears to be a typographical error. See Record, pp. 19 & 15 respectively.

Among the distinguished authors whose works appeared in the issue were Herbert Ernest Bates, perhaps best known in the United States for *The Purple Plain*, Rhys Davis, whose *The Trip to London* delighted thousands of its readers. Pierre Louys, famous for *Aphrodite*, and Edwin Beresford Chancellor, author of *The Lives of the Rakes* and many other historical works. Here, too, were pieces by Harold Alfred Manhood, John Cournos, Patrick Kirwan, Henry Miller, and Harry Roskolenko (Colin Ross).

In England, D. Val Baker criticized the Postmaster General's earlier exclusion of *American Aphrodite* from the United States mail, pointing out the genuine literary quality of its contents. Baker, *Aphrodite in Trouble*, 168 Publishers' Circular and Booksellers' Record 924 (1954)."

"89. Record, pp. 1-19; Brief for the United States in Opposition, pp. 12-13 . . . Since the count involving only American Aphrodite included both the book itself and advertisements for it, the sole element of consistency in the verdict is the conclusion that the book was obscene . . ."

[19]The granting of writs of certiorari are discretionary. Supreme Court Practice, Third Edition, Stern and Gressman, page 118.

[20]See 352 U.S. 964 and 45 Minn. L. Rev. 5, 22.

On the other hand, David S. Alberts' approach to this Court was by way of appeal under 28 U.S.C. section 1257,[21] rather than by petition for writ of certiorari. In his jurisdictional statement, one of the issues raised was whether the statute "upon its face and *as construed and applied*" abridged "freedom of speech, press and thought."[22] which should have been sufficient to state grounds for appellate jurisdiction on the issue of obscenity under 28 U.S.C. section 1257.[23] This Court noted probable jurisdiction in *Alberts v. California*, 314 U.S. 160, which theoretically placed the obscenity issue before this Court. Alberts argued the matter to some extent in his briefs.[24]

In its majority opinion in *Roth-Alberts (supra)*, this Court said on the issue of obscenity *vel non* at page 476, footnote 8:

> "No issue is presented in either case concerning the obscenity of the material involved . . ."

Was this Court saying that this issue was so unsubstantial as to require no discussion?—in effect, that

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[21]"Where an appeal may properly be taken, the so-called obligatory jurisdiction of the Supreme Court is thereby invoked, in contrast to the discretionary jurisdiction over certiorari cases . . ." Supreme Court Practice, Third Edition, Stern and Gressman, page 63.

[22]Jurisdictional Statement, pp. 4-5, 45 Minn. L. Rev. 5, 25.

[23]"The 'validity' of a state statute is also said to have been sustained. within the meaning of §1257(2), when the state court holds the statute applicable to a particular set of facts as against the contention that such an application is invalid on federal grounds. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282. This is true even though the statute on its face bears no federal impediment. Thus where the court holds that a particular transaction is intrastate rather than interstate commerce and that on such basis the state statute may be applied and enforced, the validity of the statute has been sustained as to those facts." Supreme Court Practice, Third Edition, Stern and Gressman, p. 67.

[24]See 45 Minn. L. Rev. 5, 25, and footnotes 110, 111.

without the other major issues the Court would not have written an opinion, but would have dismissed for want of a federal question or affirmed the appeal without opinion as in the case of *Joseph Chobot v. Wisconsin (supra)*. Or did the Court give Mr. Roth and Mr. Alberts less than justice? Roth was facing a 5-year sentence and $5,000.00 fine and Alberts was facing a 30-day jail sentence. In their concurring opinions, both Justices Harlan and Warren reviewed the materials.

One commentator has interpreted this footnote to indicate the majority did not treat the obscenity issue. 45 Minn. Law Review 5. But this is inconsistent with the role of the jurist expressed by Justice Brennan, its author in his dissenting opinion in the companion case of *Kingsley Book Inc. v. Brown (supra)* at 448:

> "Of course, as with jury questions generally, the trial judge must initially determine that there is a jury question, i.e. that reasonable men may differ whether the material is obscene . . ."

Later opinions of its author have indicated that review of the subject matter was necessary in free speech cases.[25] Justice Brennan would employ the rule as stated in the American Law Institute, Model Penal Code (1962), section 251.4(4) which holds that "The court shall dismiss a prosecution for obscenity if it is satisfied that the material is not obscene."[26]

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[25]See, for example, the opinion of Justice Brennan, concurred in by Justice Goldberg, in *Jacobellis v. Ohio* (*supra*) at p. 1679:

> "Hence we reaffirm the principle that, in 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected . . ."

[26]*Jacobellis v. Ohio* (*supra*), footnote 6 of Justice Brennan's opinion.

It should also be noted that in the majority opinion, Justice Brennan said at page 489:

> "Both *trial courts* below sufficiently *followed* the proper standard. Both courts used the proper definition of obscenity . . ." (our emphasis).

Does the language "trial courts . . . followed" indicate that the majority found that the trial court in *Alberts* correctly applied "the proper standards to the material?"

C. The Roth-Alberts Standards.

The majority opinion in *Roth-Alberts* (*supra*) approved four definitions for the word "obscene." At page 486, the federal court sponsored test in *Roth* and the State Court sponsored test in *Alberts* were set forth:

> "In *Roth*, the trial judge instructed the jury: 'The words obscene, lewd and lascivious as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful *thoughts*.' (Emphasis added.) In *Alberts*, the trial judge applied the test laid down in *People v. Wepplo*, 78 Cal. App. 2d Supp. 959, 178 P.2d. 853, namely, whether the material has 'a substantial tendency to deprave or corrupt its readers by inciting lascivious *thoughts* or arousing lustful desires.'"

The court thereafter held both tests to be within the constitutional standard, when given with proper jury instructions relevant to the dominant theme and proper audience.

At page 489, Justice Brennan gave tacid approval to a *third* definition in these words:

> "Some American courts adopted this standard but later decisions have rejected it and substituted this test: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press . . ."

At page 487, footnote 20, the majority opinion gave approval to the definition found in the A.L.I. Model Penal Code, Section 207.10(2) (Tentative Draft 1957) and noted no significant difference between this and the meaning of obscenity developed in the case law:

> ". . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. . . . See Comment, *id.*, at 10, and the discussion at page 29 *et seq.*"

D. The Trial Court Followed the Roth-Alberts Standards.

Trial Judge Body properly followed the Roth Standards. He noted preliminarily in his opinion at 224 F. Supp. 129 at 133;

> "If material has *any* socially redeeming importance it is protected . . ."

In his investigation into the matter of "social redeeming importance" he applied the facts at bar, and did not move in a vacuum, as petitioners would have this Court do. The variable nature of obscenity requires this.

Burstein v. U.S., 178 F. 2d 665 (Dec. 28, 1944); *United States v. Levine*, 83 F. 2d 156, 157 (Apr. 6, 1936.)

1. Liaison Vol. 1, No. 1.

As to "Liaison Vol. 1, No. 1," he found that the three articles, "Slaying the Sex Dragon," "Semen in the Diet," and "Sing A Song of Sex Life" covered the most "perverse and offensive" behavior and that the treatment was "largely superficial". He noted that the defendants' own expert, Magazine Editor Dwight MacDonald, testified that it had "no literary value". If it could be said there was social redeeming importance in the magazine, it had to be found in what it advocated, or in its entertainment value. As to the latter he found the material beyond contemporary community standards "even in applying the liberal night club standards." As to the former it failed "to serve a legitimate purpose of an author in recording human experience or in seeking to accomplish a worthwhile objective." The *only* idea advocated was complete abandon of any restraint with regard to any form of sexual expression, which one can say exists in every form of pornography. He found the pamphlet "designed obviously and solely for the purpose of appealing to the prurient interest of an ordinary person."

Amicus submits the trial judge properly applied the Roth Standards to "Liaison", noting further that the idea expressed by all pornography, *i.e.*, the complete abandonment of any restraint with regard to forms of sexual expression, is too "slight" to be redeeming. *Chaplinski v. New Hampshire (supra)*.

The finding that the pamphlet was "designed" solely for its appeal to prurient interest is supported by the common scheme or plan which attended the creation and

dissimination of "Eros Vol. 1, No. 4" and "The Housewife's Handbook on Selective Promiscuity." A.L.I., Model Penal Code (1957 draft) section 207.10(2)f.

The judge considered the proper audience in making his findings. This Court approved an instruction in *Roth* which held: "The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community . . ."

As to the audience he considered, the trial court said:

> "It is also the law that the community as a whole is the proper consideration. In this community, our society, we have children of all ages, psychotics, feeble-minded and other susceptible elements. Just as they cannot set the pace for the average adult reader's taste, they cannot be overlooked as part of the community. The community as a whole is not an ideal man who wouldn't seek and read obscenity in the first place. Otherwise no restraint at all be required. Some is proper. Therefore, an ideal person without any failings or susceptibility is not the man to protect. Society as a whole, replete of course with various imperfections, must be protected."

2. The Housewife's Handbook of Selective Promiscuity.

As to "The Housewife's Handbook on Selective Promiscuity" the trial judge noted that, as in the case of "Liaison," no literary merit was ascribed to the book. Its only claim to redeeming value was expert testimony to the effect that it had utility as a clinical device to "ventilate" persons with sexual inhibitions and misconceptions. The court expressly rejected that testimony.

The court noted that the author testified under oath it was a factual and highly accurate reporting of actual occurrence, but that he doubted the accuracy of the book (indirectly, her testimony). It met the prescribed tests for pornography—it was a bizarre exaggeration, morbid and offensive. An examination of the book in capsule form, by book outline bears out the correctness of this finding (Appendix A).

The court explained its reason for disbelieving the testimony of the Reverend George von Hilsheimer III, "This same witness shocked the writer by saying that this book should be in every home and available for teen-agers for guidance in sex behavior, but in my opinion misbehavior . . ." It was petitioners' expert witness, Rev. Hilsheimer who first brought up the matter of the book's suitability for use by "youth" [R. 291a]. He volunteered in his direct testimony at R. 291a and R. 292a that it was an "innocent book" which it was necessary for him to give "youth" as a pastoral counselor, if he was going to be responsible "to his youth." The trial judge questioned him further, and it developed that that was what he meant.

It should be noted that petitioners' other expert witness along these lines, Dr. Charles G. McCormick (psychologist) did not agree with Rev. Hilsheimer, who said he did not supervise the reading, [R. 295a]. Dr McCormick applied a restriction [R. 217a] to "guide the person in making distinctions."

Dr. Bennett, the psychiatrist testified that a 14-year old would not be disturbed by the "Handbook." The trial judge had reason to question the standards he employed in his expert testimony on the "effects of the material, and to reject the same.

The determination of obscenity is ultimately with the fact finder and not with the expert witnesses in any event. *United States v. Kennerley*, 209 Fed. 119, 121.

The judge considered the proper audience in making his findings. This Court approved an instruction in *Roth* which held: "The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community . . ."

As to the audience he considered, the trial court said:

> "It is also the law that the community as a whole is the proper consideration. In this community, our society, we have children of all ages, psychotics, feeble-minded and other susceptible elements. Just as they cannot set the pace for the average adult reader's taste, they cannot be overlooked as part of the community. The community as a whole is not an ideal man who wouldn't seek and read obscenity in the first place. Otherwise no restraint at all would be required. Some is proper. Therefore, an ideal person without any failings or susceptibility is not the man to protect. Society as a whole, replete of course with various imperfections, must be protected."

The prurient nature of "The Handbook" is attested to by the common scheme or plan which attended the creation and dissemination of "Eros Vol. 1 No. 4" and "Liaison". A.L.I. M.P.C. (1957 draft) section 207.10(2)f. The stipulation as to "knowledge" did not foreclose other admissible evidence on intent for the prosecutor reserved that right [R. 152a].

3. *Eros Vol. 1 No. 4.*

As to "Eros Vol. 1 No. 4" the judge properly construed the "balancing" concept of the A.L.I Model Penal Code (1957 draft) section 207.10 to find no redeeming social importance. This fact is demonstrated by his comparison of the novel Lady Chatterley's Lover with the work under scrutiny, "It is one thing to create an integrated work of art containing what would be obscenity standing alone, and another thing to create an integrated work of obscenity containing excerpts from recognized works of art."

As the Judge noted, the Allen Ginsberg article was a written statement of policy, purposely contrived and disseminated—the destruction of all barriers against sexual behavior of any kind. When this is combined with independent displays of obscenity, the innocent will not shield the obscene.

The question of redeeming social importance must be determined in the light of the facts and not in a vacuum. The variable nature of obscenity requires this. *Burstein v. U.S.*, 178 F. 2d 665 (Dec. 28, 1944); *United States v. Levine*, 83 F. 2d 156, 157 (April 6, 1936).

In the case of Eros, the items of possible merit and those which are considered innoculous are a mere disguise. The "overriding theme, and the only theme of Eros is the advocacy of complete sexual expression of whatever sort and manner." The finding that the magazine was "designed" solely for its appeal to prurient in-

terest is supported by the pattern—the craftily compiled overall effect, which purposely loads the forbidden fruits: "Frank Harris, His Life and Love", "Bawdy Limericks", "Natural Superiorty of Women as Eroticists" and "Black and White in Color" and seeks to ameliorate the criminal liability through the disguise. The whole, however, take on the flavor of the part.

Amicus submits that the "design" of Ginzburg's operations on Eros to appeal to prurient interests is also supported by the common scheme or plan which attends the creation and dissemination of his other products, "Liaison" and "The Housewives Handbook on Selective Promiscity." The stipulation as to "knowledge" did not foreclose other admissible evidence on intent, for the prosecutor reserved that right [R. 152a]. See also A.L.I., MP.C. (1957 draft) section 207.10(2)f.

The judge considered the proper audience in making his findings. This Court approved an instruction in *Roth* which held: "The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. . . ." As to the audience he considered the trial court said:

> "It is also the law that the community as a whole is the proper consideration. In this community, our society, we have children of all ages, psychotics, feeble-minded and other susceptible elements. Just as they cannot set the pace for the

average adult reader's taste, they cannot be overlooked as part of the community. The community as a whole is not an ideal man who wouldn't seek and read obscenity in the first place. Otherwise no restraint at all would be required. Some is proper. Therefore, an ideal person without any failings or susceptibility is not the man to protect. Society as a whole, replete of course with various imperfections, must be protected."

E. Social Importance.

1. *It Is Not Determined in a Vacuum.*

At page 32 of their brief, petitioners argue "Only if the words of Roth 'utterly without redeeming social importance' mean what they say, can criminal obscenity statutes survive the challenge that they violate the Fifth, Sixth and Fourteenth Amendments. Thus, material found to have some social value may not be suppressed and certainly may not be the basic for criminal conviction of the utterer or disseminator. Only when a work is found to be totally devoid of value can we even begin to subject that work to the other tests which identify actionable obscenity. . . ." Such an argument misconceives the very nature of obscenity—it has a variable quality about it. The guilt or innocence of the act, display, or publication depends not only upon the work but also upon the surrounding circumstances. The time and manner of acting and motives involved are always relevant and may even be determinative. Petitioner's argument lacks a necessary qualification. The value must be considered in light of the circumstances.

For example, at page 50 of their brief, petitioners take issue with the court below, because the trial judge

found that there was "no credible evidence that the 'Handbook' had the slightest valid scientific importance for treatment of individuals in clinical psychiatry, psychology, or any field of medicine." In doing so, the judge indicated he was not won over by the testimony of the Reverend von Hilsheimer, Dr. Bennett and the author on that score. But assuming that the testimony did indicate some value as a case history or the like, that value cannot be considered alone and in a vacuum, independent of the petitioners' personal conduct in relation thereto.

The classic example is *Burstein v. U.S.*, 178 F. 2d 665 (Dec. 28, 1949). A book entitled, "Sterile Sun" had been published by Macauley Company and issued by that company in a special edition, the sale of which was limited to physicians, psychiatrists, sociologists, social workers, educators and other persons having a professional interest in the psychology of adolescents. The book was to be found in the public library upon the restricted shelves. Burstein made copies of the book, omitting the statement of the publisher respecting the limitation of sale, and an introductory note which emphasized the statement that the book was written for a professional group. He gave it a new title called "Confessions of a Prostitute" and mailed circulars advertising the book as "spicy," "too sharp for ordinary consumption" and quoted a few especially salacious and suggestive lines from the book. On his appeal from convictions for both depositing for mailing an obscene book, and depositing for mailing a letter giving information as to where and how the book might be obtained, he argued that the book was not obscene *as a matter of law*. The Court of Appeals for the Ninth

Circuit held that the trial judge was correct in submitting the matter to the jury. Under petitioners theory, Burstein could go on about his business.

District Judge Bryan expressed the same principle in *Poss v. Christenberry*, 179 F. Supp. 411, 416 (Dec. 21, 1959). Poss argued in that case that the *per curiam* decision of this Court in *Sunshine Book Co. v. Summerfield*, 355 U.S. 372, 78 S. Ct. 365, 2 L. Ed. 2d 352, compelled a holding that his circulars, depicting nude photographs which advertised nude movies, photos and color slides, were not obscene. Judge Bryan thought otherwise, at page 416:

> "In the circular at bar there is little doubt that the publisher's purpose is to appeal to the salaciously minded. No one could be naive enough to suppose that these photographs have anything whatever to do with 'art.' The circular does not contain any ideas of redeeming social importance.' Nor has it the slightest vestige of literary or artistic merit. The publisher's purpose in putting out the material may well be 'a cardinal determinative.' See Glanzman v. Schaeffer, D.C. S.D. N.Y., 143 F. Supp. 243, 247."

See also the discussion at footnote 6.

The Petitioners' attempt to concentrate the investigation on the "thing" rather than the "conduct, in relation to the thing." A number of examples suggest the fallacy of this concept: A person may utter a four letter word, or a stream of such words in the restrictive audience of a group, when such conduct is essential to the portrayal of a character in a play, yet he may find himself in difficulty when he utters those same words over a loud speaker on the grounds of a college campus, in

defiance of community standards. A p- ·son may not be in violation of the criminal statutes were he to relieve himself (urinating) out of necessity in a public alley and accidentally be seen by a female from an adjoining yard. The result would be otherwise if he purposely summoned the attention of the female and relieved himself for the purpose of the public exhibition. In obscenity cases as in criminal cases in general, the defendant's conduct is the central issue. As stated by Chief Justice Warren in his concurring opinion in *Roth v. U.S.*, 345 U.S. 476, 494:

> "It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting."

See also Chief Justice Warren's opinions in *Kingsley Books Inc. v. Brown*, 354 U.S. 436, 1 L. Ed. 2d 1469, 1476 (1957), and *Jacobellis v. Ohio*, 378 U.S. 184, 84 S. Ct. 1673, 1685 (1964).

The same principle is very well stated by the Supreme Court of Errors of Connecticut in *Connecticut v. Sul*, 146 Conn. 78, 147 A. 2d 686, 691 (Dec. 24, 1958):

> "Obscene and indecent are not technical terms of law and hence susceptible of fine distinctions. Whether something is obscene or indecent depends upon all of the surrounding circumstances. Section 8567 comprehends material which from its very character a person of sound mind must know was

obscene and indecent. See Wigmore, Evidence (third edition) page 43. It also includes material which by the method of its presentation to the prospective reader or viewer shows a design to appeal to sordid interests. See Roth v. U.S., supra, 354 U.S. 495, 77 S.Ct. 1314 (concurring opinion). To cite an example; if language and pictures describing or portraying human sex organs are contained in a book or brochure on medical science and treat the subject with no more frankness than is required, they would not be obscene or indecent within the statute. But if the same language and pictures were taken from their context and compiled in pamphlet form to be sold or shown to children, they would be. People v. Muller, 96 N.Y. 408, 413. The purpose of the statute is to prevent the selling, showing or offering of obscene or indecent material falling within the description stated."

See also the expression of the Supreme Court of Errors of Connecticut to the same effect in *State v. Andrews,* 186 A. 2d 546 at page 550.

2. *Slight Social Importance Does Not Exculpt.*

At page 31 of their brief, petitioners argue, "The First Amendment principle bars suppression of any work of the slightest value, whether the suppression be accomplished by civil order or criminal sanction." This appears to *amicus* as an exaggerated statement of the law, easily responded to. At page 476 of *Roth-Alberts (supra)*, the majority opinion cited with approval the *Chaplinsky* Court (*supra*) opinion, which held:

"There are certain well-defined and narrowly limited classes of speech, the prevention and punish-

ment of which have never been thought to raise any constitutional problem. *These include the lewd and obscene . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality . . .*"

The very language of the Court indicates that speech may have "slight social value" and yet be subject to punishment, because by its nature it is obscene.

In support of this argument, petitioners, at page 31 of their brief cite language in *Jacobellis v. Ohio (supra)* that:

"The constitutional status of the material (may not) be made to turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance . . ."

The language is that of Justice Brennan, concurred in by Justice Goldberg and was not the opinion of this Court. The accuracy of this statement of law is doubtful, if we are to believe that this Court is following prior case law, as reported in the comments to the American Law Institute, Model Penal Code (1957 draft) section 207.10. In this regard the reporter states at page 30:

"The second aspect of the recommended definition, requiring that appeal to prurient interest be the *predominant* appeal of the material, recognizes that a work of art or literature may contain elements of prurient interest, which, however, are subordinate

to other positive values of the work. Policy as well as constitutional limitations enjoin us to safeguard freedom of expression by *balancing artistic or other merits of a work against the alleged prurient appeal*...." (Our emphasis).

and at page 40:

"11. *Effect of Artistic or Scientific Merit.* The effect of our proposals on definition of the obscene, consideration of the work 'as a whole,' and admissibility of evidence of artistic and other merits is to permit consideration of positive values of the work in determining whether the predominant appeal of the work is to prurient interest. This does not differ substantially from present law."

and at page 42:

"Our reasons for hesitating to relate the definition of obscenity directly to appraisal of artistic merit are as follows. In the first place, great artistry is not necessarily inconsistent with prurient appeal; consummate skill in execution might be the very thing which lends the work its powerful erotic appeal. . . .

Accordingly, we have refrained from making artistic or other merit a direct and independent issue in obscenity trials. On the other hand, it is obvious that the issue of 'predominant appeal' involves not only a judgment that the material in question appeals to prurient interest, but also a judgment that it has this characteristic more than any other. Thus consideration is invited to the question of what other appeal, if any, the material has. And in subsection (2) (c) we expressly provide for the

admissibility of evidence as to artistic, literary, scientific, educational or other merits.

The slight but real difference between a defense or justification on the basis of artistic worth and mere permission to introduce evidence of artistic merit as bearing on the issue of 'predominant appeal' may be seen in the possibility, under the later arrangement, of (1) convicting notwithstanding great artistic competence, where the main appeal is to prurient interest; and (2) acquitting notwithstanding that the material has little or no artistic merit and some, but not much, appeal to prurient interest, in short, is a dull piece with no significant 'appeal', where a trace of the salacious is lost in a sea of inanity.

The ultimate question is how prominent is the appeal to prurient interest in the work as a whole, whatever the value judgment placed on the balance of the work." (Our emphasis).

The employment of such language in a majority opinion of this Court would invite disaster to the federal governments attempts to control obscenity. The language in Justice Brennan's opinion was taken from the California Supreme Court opinion in *Zeitlin v. Arnebergh*, 59 Cal. 2d 901, 920, 31 Cal. Rptr. 800, 813, 383 P. 2d 152, 165 (1963) where it has brought about a sterilization of obscenity law enforcement in that state. See also the incongruous result reached by four members of the New York Court of Appeals, holding that classic of pornography, Fanny Hill not obscene in *Larkin v. G. P. Putnam's Sons*, 14 N.Y. 2d 399, 252 N.Y.S. 2d 71, 74, because:

"It has a *slight literary value* and it affords *some insight* into the life and manners of mid-18th Cen-

tury London . . . Some critics, writers, and teachers of stature testified at the trial that the book has merit, and the testimony as a whole showed reasonable differences of opinion as to its value. It does not warrant suppression . . ." (our emphasis).

It is true that the Illinois Supreme Court in *People v. Bruce*, 31 Ill. 2d 459, 202 N.E. 2d 497 (1964) wrote an opinion upholding contentions similar to those of the petitioners. In that case, the majority opinion (Schaefer concurred in the result) noted that it had, in an earlier opinion in the same case, rejected the defendant's arguments that the *Roth* case, struck down the "balancing test" which was ruling case law in *American Civil Liberties Union v. City of Chicago*, 3 Ill. 2d 334, 121 N.E. 2d 585. The *Civil Liberties* case held at page 498; that:

> "the obscene portions of the material must be balanced against its affirmative values to determine which predominates. . . ."

Following the *Jacobellis* decision, the Illinois Supreme Court reversed its previous ruling, giving as its *sole* reason, at page 498:

> "It is apparent from the opinions of a majority of the court in Jacobellis that the 'balancing test' rule of American Civil Liberties Union is no longer a constitutionally acceptable method of determining whether material is obscene, and it is there made clear that material having *any* social importance is constitutionally protected."

The Illinois Court was led into accepting a rule of law it would not otherwise have adopted, at page 498:

> ". . . we would not have thought that constitutional guarantees necessitate the subjection of society to the gradual deterioration of its moral fabric which this type of presentation promotes . . ."

Mr. Lenny Bruce did not fare as well with his arguments in *Bruce v. New York* (unreported, Dec. 1964). In that criminal action in New York City he was found guilty of using obscene words in his nightclub act. On a petition for certiorari, this Court refused to consider his case in June 1965.

If the Illinois Supreme Court knew then (Nov. 1964), what it knows now (June 1965), the Bruce matter undoubtedly would have been decided differently. The strength of *People v. Bruce* (*supra*), as a precedent in Illinois is questionable.

Conclusion.

The judgment below should be affirmed.

Respectfully submitted,

CHARLES H. KEATING, JR.,
JAMES J. CLANCY,
Counsel for Amicus Curiae.

APPENDIX "A".

The Housewife's Handbook on Selective Promiscuity.

By Rey Anthony (240 pages, in two parts). Seventh printing, c1962, LC 62-21130. Documentary Books, Inc., 110 West 40th Street, New York 18, N.Y.

INTRODUCTION

By Albert Ellis, Ph. D., New York City, September 15, 1960.

Dr. Albert Ellis states: "I have no hesitation in stating that Mrs. Anthony's Handbook is one of the most honest, courageous, valuable books on sex that I have ever read." (p. 7) He compares her writing to Mrs. Hilda O'Hare, publisher of the now-defunct scientific periodical, the International Journal of Sexology, giving her own views, in terms of personal experience, "on vaginal versus clitoral orgasm." (p. 7). Drs. Mary Calderone, Sophia J. Kleegman, and Lena Levine, among others, have "consistently stated, at meetings, of the American Association of Marriage Counselors, the Society for Scientific Study of Sex, and other professional groups, that the truth about female orgasm will never be fully known until women themselves give us their own detailed accounts and studies of what happens in their minds and bodies when they are engaged in sexual relations." (p. 7). "I find that the Handbook makes a distinctly valuable contribution to sexual knowledge." (p. 8). "More power to Mrs. Anthony—and a copy of her book to many of her (and my) professional colleagues!" (p. 9). "My own Art and Science of Love, may prove quite useful to millions of young people who have much to learn about sexual technique." (p. 9).

PREFACE BY THE AUTHOR'S DAUGHTER

By Tannette Savelle (age 19), Tucson, Arizona, August 1, 1960.

"This book was not written for professional people. It was written for people like mechanics, beauty parlor operators, carpenters, and housewives . . . because our laws are not in accord with our customs, we are a nation of sex offenders. We need laws that are more in keeping with the times we live in . . . I hope this book may enrich your life, as knowing my mother has enriched mine. During the time she wrote this book, I have come to know, understand, and admire her even more than I did before." (p. 11).

AUTHOR'S FRIENDS

Bill Patterson
Thorndyke Anthony, 3rd husband
Peter Landis
Jon and Vivian Merrick
Dr. Carl Adler
Ruth
Clint Jameson
Bill Canella, 1st husband
Sage, stepfather
Larry and Lorna Scott
Randall "Rock" Brown, 2nd husband
J. C. Smith, neighbor
Eric Summers, homosexual
Dan Jacobs
Laura Baxter, negro
Bill and Bobbie Sanford
Freddie Forman, lesbian
Donald James

Bill Iverson
Floyd Stewart
Al Sanislawski

Daughters

Tanette
Niki-Sue
Shari
Jana Kae

ABOUT THE AUTHOR.

By Rey Anthony, Tucson, Arizona, August 1, 1960.

Rey Anthony was born in a small town of east Texas, thirty-seven years ago. She finished high school at San Marcos Academy at fourteen, the youngest person to ever graduate from there. She attended the University of Houston for three years, majoring in mathematics, and interested in the social sciences (anthropology, psychology, and sociology.) She married the first time at age 17, and has been married and divorced three times in all. "I could be the woman next door to you, in a middle-class three-bedroom house." (p. 14) She is a P.T.A. member, operates a publishing and printing house, member of a national business woman's organization. "It is not for my own protection that I have chosen not to use my own name, but for the protection of my friends . . . the names have been changed to protect those who may be, or may seem to be, guilty in terms of current laws and/or moral codes." (p. 14) "Legality does not sanctify sex—any more than illegality makes sex filthy. . . . What may appear to be exceedingly promiscuous to one person might be the highly discriminating and therefore selective act of another person. . . .

Therefore, in the title of this book I have included the paradoxical concept of 'Selective promiscuity.'" (p. 15) Rey Anthony is the mother of five daughters.

PART 1 . . . Experiences. (p. 19)

Age 3 . . . Dallas (1926)

The author wants to know where babies come from . . . her mother says she will tell her when she is older. The kids in the neighborhood had a contest to see who could produce the most awful smell. . . . "The most disgusting thing I had ever smelled was my pussy. . . . When I peed my mother would say, 'Wipe yourself.' I wiped my fingers across my pussy and returned to the kids. We all produced our smells and I won. . . . There was a rumor among the kids that boys didn't have pussies . . . one afternoon a boy showed me his peter . . . we wee-weed on the floor of my playhouse. . . . My mother yanked the door of the playhouse open. . . . She hit me over and over." (p. 20)

Age 5 . . . Dallas (1928)

"My father died. I asked my mother why it couldn't have been her. I loved Daddy best." (p. 21)

Age 7 . . . Houston (1930)

"My grandfather pawed my pussy. Because of my great disgust for his ugly face, with the tobacco juice stringing from the corners of his mouth, I didn't look often. . . . It's not easy to stand with your legs apart, as though straddling an unseen object, so that an old man can explore your privates. . . . His searching fingers found the tiny opening and he managed to push one of them into it . . . with his other hand he was feeling the undeveloped titlets. . . . My grandmother would not

believe me when I told her about his feeling me. She said he was a man of God. 'He is a Baptist Minister. It is sinful of you to tell all those awful lies about this good man.'" (p. 22)

Age 8 . . . Houston (1931)

"Marjorie's mother worked. She was gone all day . . . Marjorie's brother, Bud had a cute little peter. It was a little larger around than a pencil. (p. 22) Bud liked our pussies, and we licked and sucked on his peter." (p. 23)

Age 9 . . . Houston (1932)

Pages 24 to 25 describe her technique of masturbating in the bathtub. "When I took a bath, I slid up and down in the bathtub on my back. Once, when the water was running, it splashed on my pussy. It felt so nice I kept on doing it . . . and reached such a peak, that it was almost unbearable, and suddenly my hole just jerked and jerked. . . . (p. 24) Running the water all over the pussy felt good, but running it on the little bump produced the feeling that finally caused the exciting and wonderful jerking. I got mamma's cold cream, and rubbed it on the bump. I could better control myself this way." (p. 25)

Age 10 . . . East Texas (1933)

"My cousin Sydney showed me how to fuck. I felt as if I were going to pee. I told him, and he said, 'Go ahead.'" (p. 26)

Age 13 . . . San Marcos (1936)

At the San Marcos Baptist Academy, the author's roommate Ruth, knew a good deal about life. "She had

already fucked, she said . . . in cars, and in swings, and on the ground sometimes. . . ." (p. 29) Pages 29 to 31 describe the author as she continues her practice of masturbating in the bathtub. "I continued playing with myself in the bathtub. . . . I also played with myself in bed. . . . I used cold cream to lubricate the little bump. . . . I was told that some of the girls played with one another. . . . I never got to know one well enough to have such an affair. . . . Obviously no one else could do this to my body as well as I could do it to myself." (p. 31) She is exposed to pornography at the Academy. She got her first accurate information about sexual intercourse from "The girl of the Golden West." (p. 32)

Age 14 . . . San Marcos (1937)

Pages 32 to 34 describe sex discussions by the house mother of San Marcos Academy. "The house mother explained in plain and simple terms, with a certain loveliness added, about sexual intercourse." (p. 32) "The boys were said to have sex with the cows that were kept for milking purposes. If caught, a boy would be expelled for this. None were caught." (p. 35)

Age 15 . . . Houston (1938)

"I was shocked at girls who let boys take sexual liberties. . . . The girl who lived behind us . . . allowed the whole winning football team of Jeff Davis High School to lay her on the football field. . . . I asked her, 'Wasn't it sloppy?' 'Oh, not so sloppy; I wiped off in between times.' ". . . The author says she wants to be a virgin when she marries. . . . "In spite of all my exploring and the fact that my cousin had had his peter in my pussy—I mean penis in my vagina—I still thought of

myself as a virgin. (p. 38) One of my best girl friends let her boy friend play with her titties. Breasts, that is. . . . My girl friend, after over a year of this fascinating play, still had small breasts and they didn't sag. . . . I went with one boy who was kissing me and had put his tongue in my mouth. . . . He put his hand on my stomach and moved it lower and lower . . . with all my clothes on and without consciously intending it to happen. I reached climax." (p. 40)

Age 16 . . . Houston (1939)

The author meets a young boy, Clint Jameson. "We spent literally hours kissing each other. . . . Pages 42 to 47 describe this affair in detail. "There were times when I would masturbate him with my hands. Other times he would kiss and suck on my clitoris. Now I put his penis in my mouth . . . even when I menstruated he kissed my genitals, and caressed, and sucked. . . . When we had intercourse we always used contraceptives." (p. 46)

Age 17 . . . Houston (1940)

Clint enlists in the Navy and came home on leave. . . . "He put his penis in my vagina and promised not to reach climax without first putting on a rubber. I couldn't face pregnancy alone." (P. 47.) He betrays her and fearing pregnancy after her menstrual period is a week late, she sees the family doctor. "Dr. Marsh examined me and it hurt. He mashed inside me and pulled and pushed. . . . I think you will menstruate in a couple of hours' " he said. (P. 49.) She tells Clint she is through with him.

Age 17 . . . Houston (1940)

On reaching simultaneous climax with a man she says, "I had never wanted to have a climax at the same time he did. . . . When we were having intercourse the sensations were pleasant, and I liked paying total attention to him and making him enjoy the climax he reached. . . . My girl friend Ruth told me, 'girls who jacked off before they started getting screwed sometimes didn't come from getting screwed. It seemed that they got to liking coming from jacking off and then weren't normal.' " (P. 51.)

Age 17 . . . Houston (1940)

She meets Bill Canella. Pages 51 to 53 describe her affair with Bill. "He kissed all of my body in the next few weeks and I kissed all of his. . . . He could make me reach climax by stroking the clitoris gently and kissing the nipple of one breast. . . . Bill could drape his long body around mine and have his penis inserted in my vagina at the same time." (P. 52.) They were married in November, 1941, and move in with her mother and her husband, Sage.

Age 18 . . . Houston (1941)

Her first daughter, Tanette, is born. Five days later she and Bill decide to have sex. "Tanette was lying in her bed, right by my bed. . . . When Tanette would squirm I had trouble keeping my mind on reaching a climax. . . . It was my first really unpleasant sexual experience. . . . Ruth's baby, Dana, "was ten months old when she was observed putting her hand inside her diaper and looking pleased. When the diaper was removed it could be seen that she was rubbing or stroking her clitoris. She was quite happy doing it." (P. 60.)

Age 19 . . . Houston (1942)

When the author's baby is six months old, she is pregnant again. . . . She separates from her husband . . . and has an abortion. (P. 64.) "The abortion was a horrible experience, not because it was an abortion, but the way it had been done." (P. 66.) Page 66 describes Rey having climax in the front seat of Bill's car after he returns to see her a week after she has had the abortion. "He fondled my 'Mons Veneris'. He stroked the sensitive skin at the top of my thighs, just on the outer edge of the large lips. He put his finger in my vagina and moved it in and out . . . sitting in the car I reached climax." (P. 66.) On the morning she is to go to court to get her divorce, Bill arrives and they go to bed. "I know we thought we were the only two people in the world ever to be getting a divorce and still having sex with each other." (P. 67.)

Age 20 . . . Houston (1943)

Rey gets a job at a shipyard. She meets Marie, a whore. "She was charming. She was one of the most completely gracious people I have ever known. 'When you have sex, my dear, do not do it in the back seat of cars. Do make sure you have the basic conveniences of life, such as a bed, hot running water, and towels,' she said." (p. 69)

Rey's foreman propositions her and she refuses him. The next afternoon he fires her. She thought, "You son of-a-bitch! Can't you get a woman in bed with you any other way?" (p. 70) Later she is rehired at the same shipyard, and in a medical examination she is told she has syphilis. She goes to another doctor who tells her it is "monilia albicans". (p. 73) He tells her it is

contagious like any other veneral disease, and tells her it serves her right for fooling around. She realizes she had first contracted this infection about four months after she began having sex with Bill Canella. She is finally cured of the disease by a woman doctor.

For several months she went without sexual relations with a man. "I had masturbated some, but not much." (p. 75) Wanting sexual relations with a man, she goes to bed "with a little fellow who didn't know I was there. He kissed me a couple of times and climbed onto my body. He just joggled and joggled, had an orgasm, and fell off. 'Go take a leak,' he said." (p. 75) She has much the same experience with another man. "The nearest anyone came to knowing I was a person and could feel thing too, was a fellow who asked, 'Dija come?' " (p. 75) One man who made her reach climax was unhappily married, "We had successful sexual relations but he was much too involved with his home life to get very involved with me." (p. 76) She goes to a tourist cabin with these various men. Pages 76 to 82 describe her affair with Larry Scott, a married man. "I showed him how he could lie beside me and insert his penis in my vagina. Then he could stroke the clitoris and manipulate the breasts as Bill had. . . . He was a really wonderful lover in no time at all." (p. 78) "His penis was smaller than Bill's and Clint's had been. So had the other men's been smaller . . . I thought: how unique that the first two penises I should come across should be larger than average." (p. 79) Larry's wife, Lorna, finds Rey's billfold on the front seat of his car. She goes to Rey's apartment and believes Rey when she denies she was with Larry. They become good friends, and Rey continues her affair with Larry. Lorna tells Rey how much their

sexual relations had improved. "She even confided to me about the new way they had intercourse—from the side, as she put it." (p. 82) Larry wanted to leave Lorna and his two sons to marry Rey, but he cared for Rey more than she cared for him. They finally stop seeing each other. "I had grown to care for another man who didn't care for me." (p. 82) "I felt the pain of loving this man and having him not care for me at all." During intercourse he said, "Move your tail." He snorts in disgust when she says she doesn't know how. (p. 82)

She meets Randall Brown, or Rock as she calls him, on a street corner while waiting for a bus. He walks her home, and they talk until five in the morning. He was in the Navy, and a likeable person.

Rey's stepfather, Sage, propositions her one day when her mother is out of town, but Rey refuses him. (p. 84)

Age 21 . . . Houston (1944)

Rey writes to Rock in the Navy. He asks her to marry him and she accepts. She writes him she has had sex before she married and was divorced, and "would never be true to any man . . . I wrote to him that not only did I do things like that, but I didn't think they were bad." (p. 85) "Mamma made some pictures of me in our back yard—with some black panties and a black bra on. They managed to look ladylike and sexy at the same time." (p. 85) She sends the pictures to Rock. When he comes home on leave, she gets a hotel room, but he tells her he wants to wait to have sex until after they are married. "The longer he stayed the more he decided it wouldn't be necessary to wait . . . He kissed me a couple of times, climbed on me, joggled a few minutes, and reached climax . . . he said it was good,

and went to sleep quickly, and I lay there wondering what was so good about it." (p. 86) They continue to have sex whenever he comes in on leave. She tells him she wants to have her "clitoris rubbed gently." Rock says it's not normal. "It makes me feel like I'm not a real man if I can't use my peter," he says. "You can use it, but for me, use your hand," Rey says. (p. 87)

Age 22 . . . San Francisco/Houston (1945)

Rey marries Rock, and after the first couple of weeks all of the novelty was gone. They argued, and it didn't take Rey long to realize she was getting sexual excitement out of the anger. They agreed not to have sex after they argued so they wouldn't get accustomed to a "pattern of messy fighting, making up, and screwing." (p. 88) Rey is expecting a baby.

Rock tells her when he had elephantiasis, the doctor gave him prostate massages. "The doctor would insert a finger in his rectum and move it back and forth, and though this would hurt unbearably, he would reach an orgasm." (p. 89) He felt this treatment had something to do with his lack of sexual desire.

They go to visit Rey's mother. Tanette asks what fucking is, and Rey tells her it is sexual intercourse. Tanette's grandmother finds her in a back bedroom with a little boy looking at each other's genitals, and she shouts at Tanette not to do anything like that again. (p. 91)

Bill Canella pays Rey a visit. He has remarried. and his wife is pregnant for a second time. He says he knows it can't be his child.

As Rock didn't want sex. when Rey went to bed she thought sex pictures. "I had dogs having sex with women, men having sex with horses, two men having

sex with me, some woman and man having sex and I would be one of them. (P. 94.) When Rock wasn't home I would sometimes go to bed and masturbate. But when he was home in bed with me I would make the pictures and have an orgasm." (P. 94.)

Rey takes castor oil and ten grains of quinine to induce labor of the expected baby. She insists Rock have sex with her when the labor pains start. Rock is reluctant but finally agrees. Page 96 describes them in bed. "Rock gently manipulated my clitoris. I reached a wonderful orgasm. . . . While I masturbated Rock, the pleasant sensations ebbed away and the pain of the labor contractions flowed in around me again." Her second daughter, Niki-Sue is born, and a few days later Bill Canella's baby is born. "It looks so much like him that it was unmistakably his child. "The woman always knows it's her child . . . but the man can only wait and hope—and sometimes never knows for sure." (P. 98.)

After Niki-Sue's birth, they move into a new house. Their neighbor, J. C. Smith, has an extraordinary "tool," Rock said he had an eleven inch penis. "Maybe it was even twelve inches; Rock had seen it when it was semi-erect, semi-flaccid, and wasn't at its best. Rock laughed and said that some fellows' peters never got any bigger even when they got hard." (P. 99.)

Rey is tired and ill, so she goes to a doctor telling him she has a sex problem. He advises her to, "masturbate. get another man, but take care of it. (P. 102.) I told him about the pictures—and the mental masturbation. That takes ability, he said. (P. 102.) Rey's sex problem still bothering her, she talks to Rock about it. telling him she prefers sex with him two or three times

a week instead of having to masturbate. Her mother and Rock convince her to go to another doctor. She does, and this doctor says, "There is just one thing I want to know: What are you doing here? Send your husband and your mother in. *They* need help." (P. 103.)

Age 23 . . . Houston (1946)

Rey goes to a motel with Larry Scott. Page 104 describes intercourse between them. "Once he got it (penis) inserted and said, 'Be still.' But even though I never moved once, he reached a climax right then." (P. 104.) She tells Rock about her sex with Larry. It upsets him, so she doesn't tell him about it again, and continues having sex with Larry. . . . Rey uses a diaphragm "with both Larry and Rock anytime I had intercourse." (P. 106.) She fails to one time with Rock and gets pregnant. . . . Their neighbor suggests a doctor that Rey can go to for an abortion. "He's the one that's been doing my mother's abortions for years." (P. 107.) Rey is really not sure if the baby is Rock's or Larry's child. She continues having sex with Larry. "Now the people at tourist cabins and motels do know what a man and woman are doing when they check in, remain a short while, and then leave. I wondered what they thought of a man checking in with a woman as pregnant as I was." (P. 108.)

When the baby (Shari) is born, it looks like Larry, and Rock says, "She's no Brown." Rey thinks, "What have I done? I am a bitch." (P. 109.)

Rock and I decided that he should have a vasectomy, so there would be no more pregnancies. She discontinues her relationship with Larry. Pages 112 to 114 describe Rey's ideas on having simultaneous climax

with Rock. "The precision of synchronously adjusting bodies to each other makes impossible the abandonment of the individual to the experience. . . . Simultaneous climax turned out to be another one of those fairy tales for the ignorant." (P. 113.)

Rey's friend Ruth, who was married with two children, went to a motel with a man who she worked with. "He sucked on her clitoris. And she had an orgasm for the first time." (P. 115.)

Rey and Rock move to North Carolina. They give up normal intercourse by mutual consent. She tells him how nice masturbating with a coke bottle can be. "I first heard of the suitability of coke bottles for female masturbation in the midst of a theological discussion with a Methodist Minister." (P. 117.)

Page 117 describes Rock using masturbation on Rey. "Rock put his thumb in my vagina, and by turning his hand so that part of it touched the clitoris, caused me to reach a climax by using a highly successful round-and-round and in-and-out movement." (P. 117.) They move back to Texas because they are so unhappy. Rock gets a job driving a taxi. They get along so poorly that Tanette prefers to live with her grandmother.

Age 27 . . . Houston (1950)

Rock goes to sea on a merchant ship. He tells Rey he has had sex with another woman, and describes how they do it with her on top. Rey wants to try it. "We did and it felt good." (P. 118.)

Rock runs into Eric Summers, who propositions him. Rock said he thought he would try it because Rey had told him to try different things sexually. "He said Eric had knelt on the floor by the bed and sucked on his penis until he—Rock—reached a climax." (P. 119.)

Age 28 . . . Houston (1951)

Rock has gone to sea, and Rey meets Dan Jacobs. "Dan said he thought sex should be performed between friends. He said he would only go to bed with a friend." (P. 119.) Pages 119 to 125 describe their sexual relationship. "I gave him information about how I liked the stimulation of the clitoris, and ultimately liked climax in that manner. . . . I was able to reach orgasms that were of beautiful intensity." (P. 120.) Dan doesn't like using his finger on her, he wants her to try "normal" intercourse. Rey liked scheduled sex, while Dan considered this "proposed scheduling about the most ridiculous thing he had ever come across . . . we had to have sex only without previous thought on the subject or it lost the beauty of spontaneousness. . . . Dan decided I was too much wear and tear on his nerves, and gave me up." (P. 123.)

Rock comes home. They move to a new apartment, and he gets a job driving a taxi. Rey becomes good friends with her negro neighbor, Laura Baxter. Laura gets annoyed with Rey because of her progressive ideas on teaching her daughters about sexual intercourse. Rey has told Tanette that pussycatting means intercourseing. Rey tells Laura, "I have no objection to your son's teaching my daughters about sexual intercourse—surely you have no objection when my daughters teach him some of the more accepted language on the subject." (P. 127.)

Rey moves to Dallas, taking Niki-Sue and Shari with her. She sells the Reader's Digest and makes good money. She meets Bill and Bobbie Sanford, who were hep, "cool cats." They teach her a whole new vocabulary. "I never found out what a penis was, but the female

sexual anatomy was summed up by the word, box." (P. 130.) She goes to a motel with Bill. "He was the craziest lover ever . . . he licked and sucked on my breasts, he nibbled at my clitoris. He sucked at the vaginal opening. The sensations were wild and wonderful, and I loved every one of them." (P. 131.) Page 131 describes them having intercourse.

Age 29 . . . Houston/Austin/San Antonio (1952)

Rock helps her in selling Reader's Digest, They hire a couple of people in San Antonio to help. Rey wants a divorce. She calls a lawyer. He tells her she should have no trouble getting one, telling her of a case where a woman wanted to have anal intercourse. "The judge saw her in his chambers, so she didn't have to bring out her sexual preference in court, and gave her a-divorce." (P. 133.)

Age 30 . . . Houston (1953)

Rey goes back to Houston, and Rock goes to Fort Worth. Page 134 describes Rey in a motel having intercourse with Bill Sanford.

Age 30 . . . Houston/Phoenix (1953)

They move to Phoenix, and Rock and Rey end their marriage. Rey says, "Rock you have tried to own my body. You couldn't do that—I own it . . . then you thought you could own me—and I just can't be owned. There's such a thing as dignity, and I have overlooked mine too long. You're leaving." (P. 136.) She divorces Rock, and continues her affair with Bill Sanford. Bill tells Rey his wife uses essence of peppermint for douching. Rey tries it, and Bill says, "You see, that makes your box very tasty." (P. 137.)

She meets Freddie Forman, a lesbian, where she works. Page 139 describes her lesbian affair with Freddie. "The kids would go in and go to bed. Freddie and I would neck. . . . She felt my breasts, and my vulva, but she was not very adept at this. I could compare her to a fumbling sixteen year old boy, easily. . . . My brief encounter with homosexuality didn't last long." (P. 139.) Rey works for Jon and Vivian Merrick. She continues her affair with Bill Sanford. "Bill introduced me to an exciting way to reach an orgasm. He would lick on my clitoris—suck on it—and put a finger into my vagina. . . . One time I was immersed in the sensations—my legs were apart and he was sucking on my clitoris—and he began to move the finger that he had had in my vagina . . . he approached the anus and began pushing his finger into it . . . when I reached climax this time it was even more intense. . . ." (P. 141.)

Age 31 . . . Phoenix (1954)

One month before her divorce is final, she meets Thorndyke Anthony. He offers her marriage. "I would have preferred simply living with Thorny instead of getting married this third time. However, marriage seemed to be the most intelligent thing to do when I considered the attitudes of the society I lived in." (P. 145.)

Thorny dislikes massaging her clitoris to have her reach climax. He asks her to try "normal" intercourse.

Bill Sanford visits her, and they "had a very nice sexual experience. He was still a competent lover." (P. 148.)

Thorny talks her into having normal intercourse, "He inserted his penis in my vagina. . . . I thought sex pictures. And I reached climax." (P. 149.)

Bill Sanford visits her again, and they have sex.

Rey finds she is pregnant, but she is not sure who the father is. She tells Thorny, and he says, "Any child you have will be our child." (P. 150.) Page 151 describes Rey reaching climax by wrapping her legs around Thorny's leg, and undulating her body until she reaches climax.

Tanette, 13 years old, has met a "charming fellow" of 17. He moves in to their apartment, and Rey approves of their, "pseudo-honeymoon-before-marriage relationship." (P. 153.) Tanette tires of him, and he leaves in dejection. His name was Donald James.

Thorny tells Rey she shouldn't make sex so important. Rey thinks: "I can always masturbate, I can cope with the situation myself." (P. 155.) They have sex after three weeks, and it was such an unpleasant experience that Rey felt, "sex is awful." (P. 156.)

Rick, a friend of Thorny, tells Rey and her daughters how his wife died trying to abort a baby of another man she had known. Rey tells Tanette, Niki-Sue, and Shari, "only with proper medical supervision could abortion ever be safe, and then it would be as safe as any other surgical operation." (P. 157.)

Age 32 . . . Houston/Tucson (1955)

Rey takes her daughters to Houston when she is eight months pregnant. She lets them watch while the doctor examines her. She wants them to be able to watch when she has the baby, but the doctor tells her this is not possible. Pages 161 to 162 describe the birth of Jana Kae, Rey's fourth daughter. There was a possibility Thorny was the father due to blood type. They all return to Tucson, but Rey knows the marriage won't succeed.

Age 33 . . . Tucson (1956)

Rey meets Bill Iverson. Pages 165 to 168 describe perversion and sexual intercourse between them. "Then he pulled my body to the edge of the bed. He sat on the floor and put his face between my legs—I felt his tongue on my clitoris. (Cunnilingus, p. 167.) Our intercourse was a lovely aftermath for me. . . . Bill and I made a very nice sexual relationship four ourselves." (P. 168.)

Age 34 . . . Tucson (1957)

Thorny goes away to school. Bill Iverson moves in with Rey and her four daughters. Pages 171 to 172 describe sex relations between Rey and Bill. "When I made love to Bill I kissed his body, fondled his testicles, kissed and sucked on his penis." (P. 171.) "When we had sex Bill masturbated me to a climax with his finger or his tongue." (P. 171.) Bill continues to have sex with other women with Rey's consent.

Pages 174 to 182 give Rey's theory on marriage. "I tend to be highly monogamous—with one person at a time—but not forever." (P. 180.)

Bill moves out when Rey leaves for Houston to meet Thorny. They have sexual intercourse once. After four months of sexual abstinence I suggested that we have sex. Thorny tells her she places too much importance on sex. "If you would spend more time on the more important things in life, we might be able to have sex once in a while." (P. 184.)

Tanette brings her boy friend Bill Patterson to the house, and he moves in. "We had our pseudo-honeymoon-before-marriage situation again." (P. 184.)

Not liking abstinence from sex relations, Rey goes to see Bill Iverson and has sex with him. She talks

to Thorny about trying to resume sex relations with him. He said he wasn't going to ever, and tells Rey he wants her to be a respectable mother to Jana. Rey says, "I will have sex. I will be in bed with a man." He accuses her of being promiscuous. She says, "If that's being promiscuous, then that's what I want to be." (P. 186.)

Tanette is sixteen now. She meets Floyd Stewart, who is 24 years old. She ends her relationship with Bill Patterson, and continues seeing Floyd.

Thorny leaves Rey after they divide their assets and liabilities. Months pass, and she builds up a printing business. "I wasn't involved in a goofed-up marital relation sans sexual sensations. I masturbated if I wanted to." (P. 189.)

Rock visits Rey. He visits with her daughters, and Rey goes to bed. "I woke up with Rock fondling my breasts. Twelve months of nearly complete sexual abstinence resulted in an immediate response on my part. . . . I had had five climaxes caused by someone else in the past year, and these five times had definitely not left me satiated. As Tanette, or anyone else who knew the facts would have put it, I was hard up. 'Just a minute,' I said. After all, Jana was lying on the other side of the bed I was on. I led him by the hand into the bedroom where he was staying that night. I got on the bed and we didn't say a word. We just made violent and passionate love. He did all the things that he knew I liked. It was extremely nice." (P. 190.) Rey asks him how sex is with his present wife, Stella, and he tells her "It's all right." (P. 190.)

Rey meets Dr. Carl Adler. Pages 188 to 210 describe their sexual relationship. "I had sex on several occasions

with another very nice man I knew, Al Sanislawski." (P. 201.)

Page 207 describes her feelings when Dr. Adler made love to her. "When he licked my clitoris, with fingers inserted in my vagina and anus, and I reached a climax. I would slide off the foot of the bed. . . . For me Dr. Adler was the man I had the most intense feeling for, so sexual relations with Rock and Al fell into the category of either 'gooder' or 'goodest.' Dr. Adler said our relations were the result of good clean lust." (P. 211.)

Tanette talks Rey into writing the book. Her daughters collate the book and put it between covers.

PART TWO. . . . Miscellaneous concepts.

A Penis by any other name . . .

"In short, one way sex is made 'filthy' as it is today, is by sheer neglect on the part of parents to provide a suitable vocabulary for things children must confront all through their lives . . . anus, vagina, penis, testicles, breasts . . . along with ears, eyes, nose, throat, legs, and brains." (P. 216.) "So long as we persist in not teaching our children authentic language at an age when they need it in order to integrate bodies and body actions into their everyday life, that long will we have 'obscenity.'" (P. 220.)

Obscenity is where you find it.

"There does not exist *anything* that is intrinsically obscene. For an individual to feel that an object or action is obscene, he must manufacture the idea of obscenity and apply it to the object of action." (P. 222.) "In some societies, women are completely unrestricted about sex and sexual matters, and the men are the same way. Obscenity takes over when possessiveness, jealousy, and hate take precedence over the more natural human emotions of friendliness and mutual respect. . . . For if you can accept a thing *for what it is* it ceases to be obscenity." (P. 222.)

Sexing for fun and profit.

"Finally, the usefulness of sexciting and sexotic pictures—the fantasizing—cannot be stressed too greatly in allowing the female to reach a climax of a wonderful nature and with great intensity." (P. 224.) . . . "let us develop the ability to create in our own minds the loveliness that can be had with good clean lust. This can be fun, and can be profitable in terms of better health and happier relations with our friends and acquaintances. Our sex life is not so separate from our life in general. The one does influence the other." (P. 225.)

"Normal" intercourse.

In actual order of importance for love making to the woman, the penis which is not easily manipulated, would have to rank third among the masculine extremities. . . . The tongue is second best. . . . The fingers are the most capable extremities in making love to a woman. (P. 226.)

Abortion.

"We are in need of more realistic attitudes regarding abortion. . . . When a woman finds herself pregnant, and in circumstances which make it impossible (emotionally) for her to bear a child, the resultant attitude can be insanity." (P. 228.)

Sex in language and action.

"We regard all practices other than 'normal' intercourse (coitus) as 'unnatural.' . . . Just a few words

that no one would want applied to himself are: promiscuous, wanton, lewd, lascivious, sensual, passionate, carnal, and lustful." (P. 232.) "Things of the spirit are created in the image of our God. Things of the spirit are created in the image of God, and things of the flesh but reflect the spirit. Of all Godlike qualities we are endowed with, the sexual capacity is one of the finest. Our sexual appetites are not of the devil, but are rather physical expression of spiritual qualities. . . . When the consciousness controls the body and creates sexual sensations, it is realizing and experiencing a very worthwhile—and spiritual—activity." (P. 233) "One fascinating aspect of sex in action is the fact that counselors and doctors now give advice that, if carried out, results in disregarding the criminal code." (P. 234.)

What price rebellion?

"There are some methodologies that would adjust all men to the world around them. . . . Dr. Robert Lindner, in his 'Prescription for Rebellion,' says that the average psychiatrist tries to 'adjust' his patients to *placid acceptance of a maladjusted society!*' (P. 238.)

"The way out and up in regard to our sexual problems in this country is by way of communication and education. Though speaking openly on sexual matters is a little rebellious, let us hope that more and more of us can acquire the willingness to confront our sexual activities. Only when we do this will we come out of our communicational and conversational dark age on sex." (P. 240.)

APPENDIX 5

COPY OF REPLY BRIEF OF AMICUS CURIAE CITIZENS FOR DECENT LITERATURE, INC., IN RALPH GINZBURG, ET AL. V. U.S., FILED IN SUPPORT OF RESPONDENT, UNITED STATES OF AMERICA, U.S. SUPREME COURT, OCTOBER TERM, 1965, NO. 42.

Reference: Brief Amicus Curiae Of James J. Clancy In ***Reno v. A.C.L.U., Et Al.***, U.S. Supreme Court No. 96-511 At **Page 4**

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 42

RALPH GINZBURG, DOCUMENTARY BOOKS, INC.,
EROS MAGAZINE, INC., LIAISON NEWS LETTER, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to
the United States Court of Appeals for the Third Circuit

Reply Brief of Amicus Curiae Citizens for Decent Literateur, Inc., an Ohio Corporation, in Support of Respondent

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I

The Government Did Not Concede That Any of the Works Had "Redeeming Social Importance"

Petitioners in their reply brief state:

> "The United States does not now dispute petitioners' showing that each of the publications at issue has redeeming social importance, and declines to defend the conclusions of the courts below that these publications have no value for society . . . "

We do not understand the respondent's position to be sussuscept of such a construction. There is no concession by the U. S. Government that any of the works have *redeeming social importance.*

The government's position,[1] simply stated, is that a work may have social importance by itself, and yet have "no value" (1) when used as a part of a larger whole, which is designed for a different purpose from that from which the "part" acquired its value, or (2) when used as a whole, but for a different purpose from that for which it had value.

In the view of amicus, that portion of Judge Body's opinion which discussed the obscenity of "Eros, Vol. 1, No. 4, 1962" correctly and adequately sets forth the first proposition and hardly requires elaboration. However, this theorem can, perhaps, be more effectively demonstrated by a more isolated example. Suppose the etching on page 11 of Eros, depicting the biblical story of the incestuous act committed by Ammon on his sister Tamar, to be incorporated into and made an illustrated part of the cheap paperback book "Strange Bondage," (W-18)[2] published by Foremost Publishers, 65 Cadillac Square, Detroit, Michigan, and distributed nationally by World Wide News Company of Cleveland, Ohio. Certainly the art value of such an etching in an art gallery to a sophisticated art audience cannot be transferred so that it constitutes "value" to save a paperback which is designed for a different purpose, i.e.,

[1] Also the position of amicus and the trial and appellate courts. The trial and appellate courts did not find it necessary to discuss the second proposition, having agreed that the Housewife's Handbook on Selective Promiscuity was not a bona fide case history.

[2] "Strange Bondage" opens with an incestuous scene between brother and sister which is interrupted by an unexpected return of the parents. Thereafter brother and sister go their separate ways through sex orgy after sex orgy until they return to each others embrace in the final chapter to complete their act of incest.

whose predominant appeal is to prurient interest. If anything, it has a *negative value,* because under the circumstances it contributes, though in the smallest degree, to the predominantly prurient appeal of the paperback text.

The mere fact that Eros contains a number of such etchings, or the like, would not take it out of the "de minimis exclusion" which Petitioners are willing to admit to.[3] Far from it. Each etching contributes a pictorial representation which lends itself to and reinforces the predominant prurient theme. Judge Body explained this in his opinion, where he said concerning other portions of Eros:[4]

> "This does not mean that the articles have no effect upon the finding of obscenity with regard to the periodical as a whole. Here is a pattern. Here is a craftily compiled overall effect . . . "

The second theorem acknowledges that a work may have social importance under a special set of circumstances, but "no value" when used for a different purpose from that for which it had value. Were the Housewife's Handbook a true case history it might be said to have value for a limited audience of professional people who have a legitimate interest in such case histories. As noted in footnote 1 however, the trial[5] and appellate courts did not consider this aspect, having rejected the factual premise upon which petitioners' defense is based, i.e., that the book was an authentic case history. The government does not "seek(s) to sustain conviction on the Handbook counts by adding a

[3] Petitioners' Reply Brief page 2, footnote 1.

[4] United States v. Ralph Ginzburg et al, 224 F. Supp. 129, 134.

[5] It bears emphasis that the trial court disbelieved the "accuracy of this book" and found it constituted "bizarre exaggeration." The author testified before Judge Body and, as a trier of fact, the trial judge had every right to pass on the matter of her credibility.

new qualification" as claimed by Petitioners.[6] On the contrary, before the government is forced to reply to that theorem, this Court must first reject the above fact findings of the trial judge, a hurdle in Petitioners' path not easily overcome.[7]

Assuming that the state of the argument does place the government in a position where it is necessary to reply, as were this Court to reject the trial judge's factual determination as to the nature of the book, still the Petitioners are not able to avail themselves of the defense. 18 USCA 1461 is a criminal statute calling for the government to prove that the defendant has knowingly mailed subject matter, the predominant appeal of which is to the prurient interest of an average person of normal sexual impulses.[8] All that the government need prove is that the defendant by his conduct abused a conditional privilege.[9] A special audience is a matter of defense in the nature of justification, which the defendant failed to place in issue at the trial. Similarly the matter of a special audience is a part of the government's case in chief, where the people wish to rely

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[6] Petitioners' Reply Brief, page 4.

[7] Amicus submits that the 24 page book outline of the Handbook, in the appendix of its amicus brief, is autoptical proof in capsule form in support of the trial judge's findings that he disbelieved the "accuracy" and found it constituted "bizarre exaggeration" and hard-core pornography. A central theme arrived at through an outlining process should be of as much assistance to this Court as Petitioners' conclusionary argument that: "As a true account of the author's sexual experiences and attitudes, it provides information and develops insights which should not be the exclusive possession of the psychiatrist . . ." (See Petitioners' Reply Brief, page 5)

[8] *Grove Press Inc.* v. *Christenberry*, DCNY 1959, 175 F. Supp. 488, 499.

[9] *U. S.* v. *Rebhuhn*, 109 F. 2 512, 514, cert. denied 60 S. Ct. 976, 84 L. Ed. 1399, 310 U.S. 629.

on a test other than the "Roth" average person test. *U. S.* v. *Levine*, 83 F. 2 156, 158.

The *Roth* (*supra*), *Levine* (*supra*) and *Rebhuhn* (*supra*) cases are authorities against the Petitioners' statement[10] that 18 U.S.C. 1461 is not a statute which makes the redeeming importance of a work turn upon the professional or educational level of its audience. See also amicus brief at pp. 68-72, discussing the variable nature of obscenity. Social importance is not determined in a vacuum.

II

The Concept of "Obscenity" Under 18 USC 1461 Includes the Sexually "Vulgar and Filthy"

Petitioners' reply that the concept of obscenity under 18 U.S.C. Section 1461 does not include the sexually "vulgar and filthy" as asserted by the government in its brief (Res. Br. 14, 29-30) is not supported by their authority, *Swearingen* v. *U. S.* *Swearingen* simply held that the language specifically set forth in the footnote of that case, which the court termed "exceedingly coarse and vulgar", did not have in it the lewd, lascivious and obscene tendency and the sexual impurity proscribed by the statute. There is no similarity between the Swearingen language noted in the footnote and that which is involved in this case.

The Court in *Swearingen* noted at page 451 that the word "obscene" had the same meaning as that term used in "obscene libel" in the Common Law. In *Roth* at footnote 20 this Court noted:

> "We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I. Model Penal Code . . . "

Since the word "obscene" as used in Section 1461 has the same meaning as the word "obscene" as used in the Com-

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[10] Petitioners' Reply Brief, page 4.

mon Law Cases, and since the Common Law definition of "obscene" is the same as that stated in the A.L.I. Model Penal Code, then it would appear that the government is correct in its assertion. See, in particular, Respondent's Brief, page 15, footnote 3.

III

Constitutional Review Is Limited to the Determination Whether the Social Importance of the Conduct or Subject Matter Is Sufficient to Take the Case Out of the Realm of a Jury Issue

The Petitioners' Reply Brief takes issue with the alternative suggested by the government in its brief as to the manner of this Court's review:

> "While we thus acknowledge that it would not be inappropriate in this case, in light of the ultimate constitutional nature of the issues of characterization involved, for the Court to undertake an independent evaluation of each of the factors under the Roth test as to each of the publications in issue, we note alternatively that the Court could limit its plenary review of the materials to the question of their redeeming importance, leaving the questions of pruriency and offensiveness to the reasonable judgment of the courts below . . . "

In this connection, amicus finds itself at slight variance with the government's arguments. We submit that this Court's review is limited to the alternative stated, i.e., the sole question is whether the social importance of the conduct or subject matter is sufficient to take the case out of the realm of a jury issue. The historical role of a reviewing court in this area has heretofore been limited to a determination as to whether a jury issue has been presented. The fine line between "candor" and "shame" has always been a jury matter. *U. S.* v. *Kennerley*, 209 Fed. 119, 120; *U. S.* v. *Levine*, 83 F. 2 156, 157; *Roth* v. *U. S.*, 354 U.S. 476 at 490; *Kingsley Book Inc.* v. *Brown*, 354 U.S. 436 (Justice

Brennan, dissenting). We believe that this Court has, in fact, been following the mode of review noted, that is, limiting its plenary review of the case to the question of the redeeming importance of the conduct and subject matter involved. See Brief Amicus Curiae, pp. 46-51, 59.

Respectfully submitted,

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JAMES J. CLANCY